

Nova Law Review

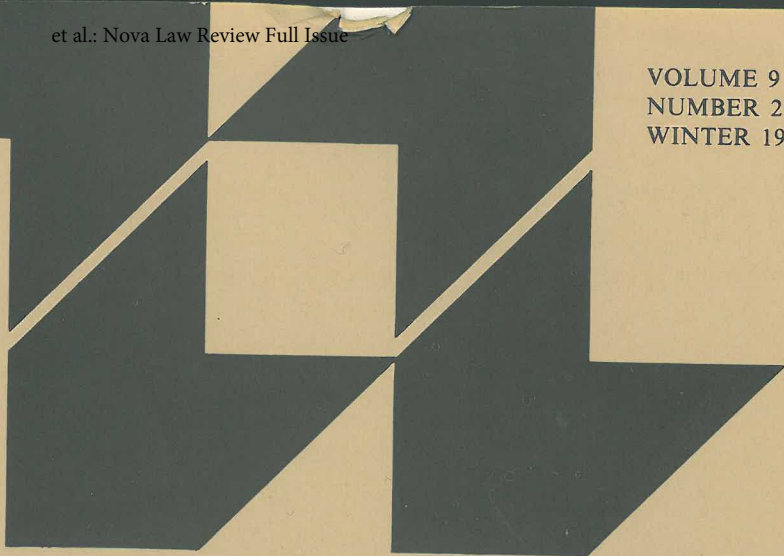
Volume 9, Issue 2

1985

Article 4

Nova Law Review Full Issue

VOLUME 9
NUMBER 2
WINTER 1985



NOVA LAW JOURNAL

ARTICLE

Standards of Review in Eleventh Circuit
Civil Appeals
Steven Alan Childress

NOTES

The Fourth Amendment and Surgical Searches:
Invasion of the Bullet Snatchers
Problems of Convicting a Husband for the
Rape of His Wife

NOVA UNIVERSITY
RECEIVED
SEP 06 1985
LAW LIBRARY



NOVA LAW JOURNAL

Contents

Articles

- 257 Standards of Review in Eleventh Circuit
Civil Appeals
Steven Alan Childress

Notes

- 331 The Fourth Amendment and Surgical Searches:
Invasion of the Bullet Snatchers
- 351 Problems of Convicting a Husband for the
Rape of His Wife

Standards of Review in Eleventh Circuit Civil Appeals

Steven Alan Childress*

CONTENTS

I. Introduction	260
II. Civil Appeals	265
A. Findings in A Bench Trial.	265
1. Findings of Fact	265
a. Development of the Clearly Erroneous Rule.	265
b. Rule 52 and Applicability	266
c. Definition	267
i. <i>Gypsum</i> : "Mistake"	267
ii. <i>Sanders</i> : "Truth and Right"	268
iii. "Substantial Evidence"?	269
d. Practical Application of Rule 52(a)	270
e. Demeanor and Documentary Evidence	271
f. Verbatim Adoption	273
g. No Findings and Faulty Findings	274
2. Conclusions of Law	275
a. Errors: Law or Fact?	275

© 1985 — Rights reserved by author.

* B.A., University of Alabama; J.D., Harvard University. The author is presently a Ph.D. candidate in the Jurisprudence and Social Policy Program at the University of California (Berkeley). This article will be expanded in a forthcoming publication from J.C. Wiley & Sons entitled STANDARDS OF REVIEW, to be published in 1986. This analysis is developed from an earlier survey of Fifth Circuit practice in 29 LOYOLA L. REV. 851 (1982). Fred Rush, Edward Petkevis, Nancy Spyke, Mary Ann Klein and Collins Forman of the Nova Law Review provided editorial and research aid on this article.

b.	State Law and Foreign Law	276
c.	Findings Based on Faulty Law	277
d.	Inferences and "Ultimate Facts"	277
e.	Mixed Law-Fact Findings	279
f.	Law, Fact, or Mixed?	280
i.	Patents and Trademarks	280
ii.	Contracts and Business Situations	281
iii.	Discrimination and Intent Cases	282
iv.	Tort and Admiralty	283
v.	Employee Status	283
vi.	Adequate Criminal Representation: Habeas Petitions	285
B.	Findings In A Jury Trial	286
1.	The Verdict	286
a.	Requirement of Evidentiary Basis	286
b.	Boeing: Rejection of "Scintilla" Rule	287
c.	F.E.L.A. and Jones Act Cases	288
d.	Applications: Inferences and Credibility	289
e.	Law and Fact	290
2.	Fact Findings and Damages	292
a.	Findings by Jury	292
b.	Special Verdicts: Inconsistencies	292
c.	Damages	293
3.	Directed Verdict and J.N.O.V.	294
a.	Rule 50 and Review Principles	294
b.	Directed Verdict as Prerequisite	295
c.	Review After No Motion: "Plain Error"	295
C.	Trial Judge: Supervision and Discretion	296
1.	Evidence and Trial	296
a.	Evidentiary Rulings: "Abuse of Discretion"?	296

b.	Comment on the Evidence	300
c.	Supervision of Trial	300
d.	General Supervision and Discretion	302
i.	Supervisory Applications	302
ii.	Attorneys' Fees and Costs	304
iii.	Forum Non and Choice of Law	304
iv.	Injunctions and Declaratory Actions	305
v.	Pendent Jurisdiction	307
vi.	Leave to Amend	307
vii.	"Discretion": A Final Note	308
2.	Jury Instructions	310
a.	Form and Consent	310
b.	The Test: Technical Errors	311
c.	"Plain Error"?	311
3.	Motions For Judgment or Relief	312
a.	Rule 12(b)(6) Dismissal	312
b.	Summary Judgment	313
i.	"Material Fact": Tests and Burdens	313
ii.	Trial Court Findings	316
iii.	Appropriateness in Specific Applications	316
c.	Rule 41(b) Dismissal	317
d.	New Trial	318
i.	Discretion and General Application	318
ii.	Weight of the Evidence	319
iii.	Conditional New Trial and Damages	321
iv.	J.N.O.V. Compared	323
e.	Reopen Judgment	323
D.	Special Principles and Applications	324

1. Panel Stare Decisis	324
2. Review of Issues Not Raised	325
3. Harmless Error	327
4. Habeas Appeals	327
III. Conclusion	329

No Spitting.

No Summary Judgments.

—Sign in the office of a district court in the former Fifth Circuit.

I. Introduction

Word has it that the United States Courts of Appeals are tough on summary judgments. The district court’s sign reflects the perception that, in practice, the reviewing court turns a strict eye on grants of summary judgment—perhaps more so in the former Fifth Circuit than in other circuits, though the verbal formulations are similar, tracking Federal Rule of Civil Procedure 56.¹ It also suggests that standards of review—catch phrases meant to guide the appellate court in approaching both the issues and parties before it and the trial court’s earlier procedure or result—really affect subsequent courts, trial and appellate, in doing their job.

The trial court’s sardonic sign at least illustrates two tines of a fork that must be kept in mind when the concept of “standards of review” is approached. First, practice counts more than words. Standards are not self-actualizing; for example, what is a “material fact?” And the formulations do not say much until the appeals court, in discussion and practice, gives them life.

Second, words may control or frame the practice. The ubiquitous standard, either in basic form or as defined and refined, is presented as a meaningful guidepost to frame the arguments to the appellate court and that court’s analytical response. Even if the catch phrases have no real internal meaning, in many cases it is clear that the issue-framing or assignment of power *behind* the words is the turning point of the decision.² That many panels take the scope of review seriously is illus-

1. FED. R. CIV. P. 56. The courts must find that no material facts are left for trial resolution. *See infra* note 286.

2. *See, e.g.*, text accompanying *infra* notes 143-45 (debate over “some evidence” rule).

trated by conclusions like the one tagged on a recent case: "This case does not present a model of proof of the statutory employer defense. Our review is, however, strictly circumscribed by the posture of this appeal. We cannot find plain error on this record."³

The importance of the review posture is also implicit in the number of cases in this article which had to be resolved by the full en banc court before the standard was settled. Additionally, the Supreme Court has seen fit recently to step into the picture to preserve the "buckler and shield"⁴ of the clearly erroneous rule against perceived evasion by the former en banc Fifth Circuit.⁵ Even that decision was not without strong disagreement.⁶

Even where review authority controls, however, it is not clear how much of the structuring is really found inside the standard of review phrases.⁷ Sometimes the intricacies are nonsensical; how can a jury in a criminal case convict on insufficient evidence (the normal review) without doing a miscarriage of justice (the test where counsel had not moved for acquittal)?⁸ Of course the tests may turn out to be a practical fiction—shorthand which ultimately does not control the appellate decision-making process. Just when it is "obvious" that the standard determines outcome, the next panel may routinely recite the proper

3. *Hall v. Crown Zellerbach Corp.*, 715 F.2d 983, 989 (5th Cir. 1983). *See infra* notes 272-79.

4. *Horton v. United States Steel Corp.*, 286 F.2d 710, 713 (5th Cir. 1961).

5. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982)(discussed *infra* notes 90-93 and accompanying text). Of course in some situations limited review is a constitutional restriction. *E.g.*, U.S. CONST. amend. VII (discussed *infra* note 136).

6. *See Swint*, 456 U.S. at 293 (Marshall, J., dissenting). The case also illustrates the confusion that at times exists in this area, the court noting that the former Fifth Circuit opinion spoke of the inapplicability of the clearly erroneous rule while simultaneously applying language associated with the test. *See id.* at 290.

7. *See generally* Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982). For example, the "substantial evidence" test for review of facts in formal administrative actions has been likened to the core of a seedless grape. *See also* W. GELLHORN, C. BYSE & P. STRAUSS, *ADMINISTRATIVE LAW* 269 (7th ed. 1979) and *infra* note 135.

8. *Cf. infra* note 187 and accompanying text (review of civil verdict absent directed verdict motion). Judge Anderson made a similar observation in *United States v. Bell*, 678 F.2d 547, 550 (5th Cir. 1982)(en banc)(concurring opinion), *aff'd*, 462 U.S. 356 (1983), noting: "To say that the evidence is sufficient if a 'reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt' is not substantively different from saying that the 'evidence was inconsistent with every reasonable hypothesis of innocence.'" *Id.* (citations omitted). The majority nevertheless rejected the "hypothesis of innocence" formulation for ordinary review of criminal convictions. *See id.* at 548-49.

language but apparently decide the case in its own way.

The problem is of course not unusual in a common law system, where judges are always human in applying and interpreting legal rules. Yet while it is easy to say the "guideposts" are meaningless post-hoc rationalizations, most courts present them as restricting or freeing their reviewing scope at least in a general way. Similarly, witness our surprise when we realize that John Hinckley's jury actually *followed* its prescribed guiding formulation in finding that the government had not met its federal sanity burden.⁹

In addition to the problem of finding the true meaning and value of the standard of review notion, two further problems quickly appear. First, the courts in general, and the Eleventh Circuit at times, have not always been uniform in their recitation and application of the specific tests.¹⁰ Second, even with an established standard, the term of the standard usually defies definition. One senses the circular difficulties a court had in explaining "abuse of discretion": "In a legal sense, discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered."¹¹

Further definition and discussion often adds nothing and is no more helpful than the term itself. "Clearly erroneous," for example, is probably clear enough (or as clear as such a non-mathematical concept allows) without the reams of garnishing and explanation courts have offered.¹² Yet the bonus definition, as law, cannot be ignored by subsequent courts, practicing attorneys, or exploring scholars.

Perhaps all the standards and elaboration could be reduced to three or four such standards—no deference, some deference, high deference, scepticism. Or as Professor Rosenberg has classified, "[a]ll appellate Gaul, the trial judge would say, is divided into three parts: review of facts, review of law, and review of discretion."¹³ Despite the

9. See Stone, *The Insanity Defense on Trial*, 33 HARV. L.S. BULL. 15, 16-17 (1982). But the Supreme Court has recited deference of "great weight" to an agency's interpretive ruling while, finding itself in disagreement with that view, rejecting it. *E.g.*, *Inv. Co. Inst. v. Camp*, 401 U.S. 617 (1971). The "great weight" becomes less deferential with the blurry qualification: "great weight to any *reasonable* construction" *Id.* at 626 (emphasis added). See generally K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 7:10, 7:11 (2d ed. 1979).

10. See, e.g., *infra* note 128 and accompanying text.

11. *Berry v. Chaplin*, 74 Cal. App. 2d 669, 672, 169 P.2d 453 (1946).

12. See *infra* notes 31-50 and accompanying text.

13. Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 173 (1978).

room for simplification in this area, however, it must be noted that the tests also often define what materials the reviewing court looks to, in addition to the scope of its review. In practice the standards appear to have some real value: to guide the process, to tip the balance to one side, to direct the court to common points of departure which are already deemed relevant. At least the standards are useful to organize an argument or holding, or to give a common language of appellate scope. Standards may even assign or reflect the power distribution between reviewing and "lower" court.

Whatever the actual value or use of standards of review, most cases on appeal set out the test appropriate for the particular issue. The smart attorney and the careful court is likely to cite or discuss the standard and its application to the issues at hand.¹⁴ Standards, whatever their substance, have strategic value in appellate practice because they "indicate the decibel level at which the appellate advocate must play to catch the judicial ear."¹⁵ For example, counsel for appellant in a recent case challenged the trial court's finding as clearly erroneous—an ambitious effort—apparently adopting that test in light of the Supreme Court's strict application in *Pullman-Standard v. Swint*.¹⁶ The attorney need not have conceded that deferential standard, however, since a strong argument was available that the finding at issue was a "mixed" question of law and fact, possibly subject to stricter review even under *Swint*.¹⁷ By sliding over the standard of review issue, counsel could have lost the chance to have the appellate court stir more freely in the trial court's soup. Even a topic as routine as the proper standard, then, may turn out to be a vital issue on appeal.

This article is offered as a guidebook to the standards used to review various decisions based on particular situations at trial in civil and habeas cases. The article reviews the several standards, their meanings, their applications, and their differences. Although this guide emphasizes Eleventh Circuit and former Fifth Circuit cases and language, many of the general tests and analyses are standard fare among all the circuits. Former Fifth Circuit precedent is particularly telling for the Eleventh Circuit, for which former Fifth Circuit precedent rules until

14. Rubin, *The Admiralty Case on Appeal in the Fifth Circuit*, 43 LA. L. REV. 869, 872 (1983) ("Start the brief by stating briefly the applicable standard of review.").

15. *Id.* at 873.

16. 456 U.S. at 273.

17. See *infra* notes 94-97 and accompanying text.

an Eleventh Circuit en banc court overrules.¹⁸ Lawyer or court may wish to follow the categories to find the proper tests—cases often involve several—or doctrinal debate. The cited standard may sound common but have a twist, in language or practice, which distinguishes it from a similar situation.¹⁹ This summary, then, may serve as a helpful reference: where the review issue is not crucial or complex, it can be addressed and passed; where it counts, this guidebook may present a first step and point to a meaningful direction.

This article, however, is meant to be more than a completed peg-and-hole set or a purely practical list. Cases are often conflicting, unclear, or skimpy on the rules and their bases. The historical development and intent of the standards is neglected. Other authorities are lacking, as substantive articles discuss and promote legal issues as if they were decided in an appellate vacuum, little attention given to the decision-making context of the issues or the assignment of power and roles among courts. These areas demand beginning analysis and questioning.

This guidebook, then, may also serve as a starting point for further inquiry, by court and commentator, into the propriety of various tests in theory and application. Courts may wish to shore up inconsistencies. Scholars may begin to ask what these standards mean and how they affect the judicial process on appeal or, in turn, at trial. Standards of review, like chemical catalysts, must act *on* something, and usually that something is more important in the final analysis. Nevertheless, the guideposts are useful in practice, and also raise substantial questions about the legal system in general. The article is presented to lawyer, court, and scholar alike as a helpful Eleventh Circuit guide and springboard.

18. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc)(the Eleventh Circuit specifically adopting Fifth Circuit precedent prior to October 1, 1981).

19. Factors commonly affecting the appropriate standard include: objections and waivers, presumptions and burdens, appellant versus appellee, fact versus law, criminal versus civil, and judge versus jury. This article attempts to categorize along these and other lines.

Similarly, the article compares other circuits' tests and rules in some divergent or illustrative situations. Although the general principles often apply nationally, specific applications sometimes differ among and within the circuits, and conflicts exist beyond the general statements of the broadly applicable standard. *See generally* S. CHILDRESS & M. DAVIS, STANDARDS OF REVIEW (forthcoming 1986).

II. Civil Appeals

A. Findings in a Bench Trial

1. Findings of Fact

a. Development of the Clearly Erroneous Rule

Before the adoption of the Federal Rules of Civil Procedure, an uneasy dichotomy existed between the standard applied in reviewing equity findings and the one reserved for those actions based in law but for which, as permitted by Congress since 1865, a jury had been waived. In nonjury legal actions the judge was seen as both judge and jury, and his findings of fact were considered as conclusive as a jury verdict, which had long been strictly protected by the seventh amendment. Equity review, on the other hand, was traditionally broader—only a self-imposed restraint—though more restrictive than that used in admiralty. Equity in fact applied three tests, varying the strength of “presumptively correct” where the evidence to be reviewed was oral, undisputed documentary, or disputed documentary.²⁰

The merger of law and equity in 1934 further complicated this divergence. Although it was accepted that law and equity would then require the same standard, the profession hotly debated whether that test should be imported from former legal practice or from “the” standard used in equity practice. In the end the broader equity test prevailed in the Federal Rules of Civil Procedure, though a draft stating it explicitly—“the same effect as heretofore given to findings in suits in equity”²¹—was rejected in an effort to avoid the uncertainty surrounding prior equity practice. In addition, the Advisory Committee attempted to bring uniformity to the equity test by stating that the new rule would be “applicable in all classes of findings,” regardless of the documentary or testimonial nature of the fact found.²²

20. See Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the “Clearly Erroneous Rule” Being Avoided?*, 59 WASH. U.L.Q. 409, 411-13 (1981); Note, *Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the Clearly Erroneous Rule Been Clearly Erroneous?*, 52 ST. JOHN’S L. REV. 68, 69-72 & nn.10-11 (1977).

21. Note, *supra* note 20, at 72-75 & n.22. The Advisory Committee made clear, however, that the equity test was the chosen one. See Nangle, *supra* note 20, at 414-15. See also *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-95 (1948).

22. Nangle, *supra* note 20, at 414-15.

b. Rule 52 and Applicability

The result was the now-famous clearly erroneous rule formulated for equity and law courts in Rule 52.²³ Rule 52(a) requires the trial court to separate and spell out its fact findings and conclusions of law. "Findings of fact shall not be set aside unless clearly erroneous. . . ."²⁴

This rule applies to review of standard civil cases and equity actions, as well as to admiralty cases,²⁵ and to habeas corpus appeals.²⁶ The rule on its face applies to findings made by a judge aided by an advisory jury as though there were no jury.²⁷ "The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court."²⁸ Similarly, fact findings of a bankruptcy judge, affirmed by the district court, are to be credited unless clearly erroneous.²⁹ Rule 52(a) by its own terms does not require the district court to

23. FED. R. CIV. P. 52(a). One brief filed with the Fifth Circuit demonstrated sarcasm about, or ignorance of, the ubiquitous nature of the rule. It argued that the "findings below are, to coin a phrase, clearly erroneous."

24. *Id.*

25. See 5A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 52.03[1] & nn.3, 26 (2d ed. 1977). Admiralty review was traditionally *de novo*, but the Supreme Court extended "clear error" review in 1954. See *McAllister v. United States*, 348 U.S. 19 (1954). In 1966 the Federal Rules of Civil Procedure were made generally applicable to admiralty. FED. R. CIV. P. 1. See Note, *supra* note 20, at 70 n.11.

26. See *infra* notes 124-26, 372-78, and accompanying text.

27. FED. R. CIV. P. 52(a). A 1946 amendment clarified the rule's applicability, as originally intended, to the advisory jury situation.

28. FED. R. CIV. P. 52(a). Cf. FED. R. CIV. P. 53(e)(2) (in nonjury actions the district court, before further hearing, shall accept master's findings unless clearly erroneous); *Morgan v. Kerrigan*, 523 F.2d 917, 921-22 (1st Cir. 1975) (distinguishing specific reference under Rule 53(c) from other Rule 53 situations). Review is less clear, however, for findings of a magistrate referred under 28 U.S.C. § 636(b). Findings under §§ 636(b)(1) and 636(b)(3) may be subject to "de novo determination." See *United States v. Raddatz*, 447 U.S. 667 (1980). But recently a court has declined such free review in a case referred under § 636(b)(2). See *Miss. River Grain Elevator, Inc. v. Bartlett & Co.*, 659 F.2d 1314 (5th Cir. 1981). See also *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982) (Unit B) (en banc) (failure to file objections in a § 636(b)(1) proceeding does not waive right to appeal district court's conclusions of law, but there is no *de novo* review of an issue covered in the report, and adopted facts are not reversed absent plain error or manifest injustice).

29. *In re Reed*, 700 F.2d 986 (5th Cir. 1983). See *Northern Pipe-line Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 55 n.5 (1982). The court's plan or provisions, however, have been reviewed under an "abuse of discretion" test. See *In re Bradley*, 705 F.2d 1409, 1411 (5th Cir. 1983). The bankruptcy referral situation is, of course, in a state of flux, both with the institution of a new system under the Bank-

state its findings and conclusions on decisions under Rules 12 or 56. But the court dismissing plaintiff's case on the merits under Rule 41(b) is subject to Rule 52(a).³⁰

c. Definition

i. *Gypsum*: "Mistake"

Soon after Rule 52(a) was adopted, the Supreme Court in *United States v. United States Gypsum Co.* defined "clear error," offering this formulation: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."³¹ The language of this definition has become standard fare in subsequent Supreme Court opinions.³² Most of the Eleventh Circuit precedent which defines "clearly erroneous" follows the *Gypsum* formula in applying Rule 52(a).³³ And *Gypsum's* "mistake" definition has itself been "defined": "Where the evidence would support a conclusion either way, a choice by the trial judge between two permissible views of the weight of the evidence is not clearly erroneous"³⁴ Review is made, at any rate, by considering the evidence as a whole.³⁵

ruptcy Code and the adjustments made to maintain the constitutionality of the referrals in light of recent Supreme Court pronouncement.

30. FED. R. CIV. P. 41(b). Denial of a Rule 41(b) motion has the effect of carrying it with the case and entering judgment on the merits at the close of the evidence. See *Rigel Fiber Corp. v. Anderson Gin Co.*, 512 F.2d 784 (5th Cir. 1975). See also *infra* note 306.

31. 333 U.S. 364, 395 (1948). In *Gypsum* the Court, on direct appeal, rejected the trial court's findings. *Id.* at 396.

32. E.g., *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 74 n.19 (1978); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960); *McAllister v. United States*, 348 U.S. 19, 20 (1954).

33. E.g., *Citibank, N.A. v. Citibank Group, Inc.*, 724 F.2d 1540 (11th Cir. 1984); *United States ex rel. G.E. Supply Co. v. Wiring, Inc.*, 646 F.2d 1037, 1041 (5th Cir. 1981); *Ferrero v. United States*, 603 F.2d 510, 512 (5th Cir. 1979); *Hague v. Liberty Mut. Ins. Co.*, 571 F.2d 262, 264 (5th Cir. 1978); *Chaney v. City of Galveston*, 368 F.2d 774 (5th Cir. 1966).

34. *Chaney*, 368 F.2d at 776.

35. *Gypsum*, 333 U.S. at 395 ("entire evidence"). Although the Supreme Court would appear to have settled this issue, the Seventh Circuit once erroneously indicated that the reviewing court looks to the evidence most favorable to the findings. See *Uniroyal v. Mumford*, 454 F.2d 1233, 1236 (7th Cir. 1972).

ii. *Sanders v. Leech*: "Truth and Right"

The standard, unfortunately, is not so clearly and consistently construed in many former Fifth Circuit opinions.³⁶ One line of cases continues to use a pre-*Gypsum* three-pronged test, reversing where: (1) findings are unsupported by substantial evidence; (2) the court "misapprehended" effect of the evidence; or (3) although there is evidence which if credible would be substantial, the "force and effect of the testimony as a whole convinces that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case."³⁷ The circuit formulated this test prior to *Gypsum* in *Sanders v. Leech*, which held that the reviewing court may reverse in the three situations above, but warned that "it is not for the appellate court to substitute its judgment on disputed issues of fact for that of the trial court where there is substantial credible evidence to support the finding."³⁸ Of course the *Sanders* test, especially in its "truth and right" incarnation, is not wholly inconsistent with the *Gypsum* approach. (The warning to appellate courts not to substitute their own judgments is prevalent in both lines of cases, for example.) In fact, some cases cite both *Gypsum* and *Sanders* as precedent without discussing possible differences.³⁹ Others seem to allow the appeals court a choice, as an "either/or."⁴⁰

Nevertheless, opinions which cite both tests tend to blur rather than reconcile. Some interpret *Sanders*' "truth and right" test as restating *Gypsum*'s "mistake" test.⁴¹ One case says that *Gypsum* man-

36. Divergent definition is an observation or criticism separate from any inconsistency in applying the standard. See *infra* text accompanying notes 51, 100-132. Cf. Note, *supra* note 20, at 68 (controversy is not over whether findings are in fact clearly erroneous but over the language of the rule, especially where credibility is involved).

37. *Western Cottonoil Co. v. Hodges*, 218 F.2d 158, 161 (5th Cir. 1954)(citing *Sanders v. Leech*, 158 F.2d 486 (5th Cir. 1946)).

38. 158 F.2d 486, 487 (5th Cir. 1946).

39. See, e.g., *Lincoln v. Bd. of Regents*, 697 F.2d 928, 940 (11th Cir.), *cert. denied*, ___U.S. ___, 104 S.Ct. 97 (1984); *Neal v. Saga Shipping Co.*, 407 F.2d 481, 484, 488 (5th Cir. 1969)(damages plainly out of measure so as to be clearly erroneous).

40. E.g., *Blum v. Great Lakes Carbon Corp.*, 418 F.2d 283, 287 (5th Cir. 1969)(findings supported by substantial credible evidence), *cert. denied*, 397 U.S. 1040 (1970); *Franks v. Nat'l Dairy Products Corp.*, 414 F.2d 682, 684 (5th Cir. 1969).

41. See, e.g., *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 258 (5th Cir.)(("in other words . . . truth and right")), *cert. denied*, 449 U.S. 899 (1980); *Armstrong Cork Co. v. World Carpets, Inc.*, 597 F.2d 496, 501, 506 (5th Cir. 1979), *cert.*

II. Civil Appeals

A. Findings in a Bench Trial

1. Findings of Fact

a. Development of the Clearly Erroneous Rule

Before the adoption of the Federal Rules of Civil Procedure, an uneasy dichotomy existed between the standard applied in reviewing equity findings and the one reserved for those actions based in law but for which, as permitted by Congress since 1865, a jury had been waived. In nonjury legal actions the judge was seen as both judge and jury, and his findings of fact were considered as conclusive as a jury verdict, which had long been strictly protected by the seventh amendment. Equity review, on the other hand, was traditionally broader—only a self-imposed restraint—though more restrictive than that used in admiralty. Equity in fact applied three tests, varying the strength of “presumptively correct” where the evidence to be reviewed was oral, undisputed documentary, or disputed documentary.²⁰

The merger of law and equity in 1934 further complicated this divergence. Although it was accepted that law and equity would then require the same standard, the profession hotly debated whether that test should be imported from former legal practice or from “the” standard used in equity practice. In the end the broader equity test prevailed in the Federal Rules of Civil Procedure, though a draft stating it explicitly—“the same effect as heretofore given to findings in suits in equity”²¹—was rejected in an effort to avoid the uncertainty surrounding prior equity practice. In addition, the Advisory Committee attempted to bring uniformity to the equity test by stating that the new rule would be “applicable in all classes of findings,” regardless of the documentary or testimonial nature of the fact found.²²

20. See Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the “Clearly Erroneous Rule” Being Avoided?*, 59 WASH. U.L.Q. 409, 411-13 (1981); Note, *Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the Clearly Erroneous Rule Been Clearly Erroneous?*, 52 ST. JOHN’S L. REV. 68, 69-72 & nn.10-11 (1977).

21. Note, *supra* note 20, at 72-75 & n.22. The Advisory Committee made clear, however, that the equity test was the chosen one. See Nangle, *supra* note 20, at 414-15. See also *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-95 (1948).

22. Nangle, *supra* note 20, at 414-15.

b. Rule 52 and Applicability

The result was the now-famous clearly erroneous rule formulated for equity and law courts in Rule 52.²³ Rule 52(a) requires the trial court to separate and spell out its fact findings and conclusions of law. "Findings of fact shall not be set aside unless clearly erroneous. . . ."²⁴

This rule applies to review of standard civil cases and equity actions, as well as to admiralty cases,²⁵ and to habeas corpus appeals.²⁶ The rule on its face applies to findings made by a judge aided by an advisory jury as though there were no jury.²⁷ "The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court."²⁸ Similarly, fact findings of a bankruptcy judge, affirmed by the district court, are to be credited unless clearly erroneous.²⁹ Rule 52(a) by its own terms does not require the district court to

23. FED. R. CIV. P. 52(a). One brief filed with the Fifth Circuit demonstrated sarcasm about, or ignorance of, the ubiquitous nature of the rule. It argued that the "findings below are, to coin a phrase, clearly erroneous."

24. *Id.*

25. See 5A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 52.03[1] & nn.3, 26 (2d ed. 1977). Admiralty review was traditionally *de novo*, but the Supreme Court extended "clear error" review in 1954. See *McAllister v. United States*, 348 U.S. 19 (1954). In 1966 the Federal Rules of Civil Procedure were made generally applicable to admiralty. FED. R. CIV. P. 1. See Note, *supra* note 20, at 70 n.11.

26. See *infra* notes 124-26, 372-78, and accompanying text.

27. FED. R. CIV. P. 52(a). A 1946 amendment clarified the rule's applicability, as originally intended, to the advisory jury situation.

28. FED. R. CIV. P. 52(a). Cf. FED. R. CIV. P. 53(e)(2) (in nonjury actions the district court, before further hearing, shall accept master's findings unless clearly erroneous); *Morgan v. Kerrigan*, 523 F.2d 917, 921-22 (1st Cir. 1975) (distinguishing specific reference under Rule 53(c) from other Rule 53 situations). Review is less clear, however, for findings of a magistrate referred under 28 U.S.C. § 636(b). Findings under §§ 636(b)(1) and 636(b)(3) may be subject to "de novo determination." See *United States v. Raddatz*, 447 U.S. 667 (1980). But recently a court has declined such free review in a case referred under § 636(b)(2). See *Miss. River Grain Elevator, Inc. v. Bartlett & Co.*, 659 F.2d 1314 (5th Cir. 1981). See also *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982) (Unit B) (en banc) (failure to file objections in a § 636(b)(1) proceeding does not waive right to appeal district court's conclusions of law, but there is no *de novo* review of an issue covered in the report, and adopted facts are not reversed absent plain error or manifest injustice).

29. *In re Reed*, 700 F.2d 986 (5th Cir. 1983). See *Northern Pipe-line Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 55 n.5 (1982). The court's plan or provisions, however, have been reviewed under an "abuse of discretion" test. See *In re Bradley*, 705 F.2d 1409, 1411 (5th Cir. 1983). The bankruptcy referral situation is, of course, in a state of flux, both with the institution of a new system under the Bank-

ward expanded review—either in practical application or through manipulation of the test(s). Broader review of fact findings is criticized for increasing appeals, undermining confidence in the judicial system, and demoralizing district judges.⁵¹ This charged “circumvention” of Rule 52 is seen as especially marked where the issue of demeanor evidence or inferences is involved.

e. Demeanor and Documentary Evidence

The district judge is often recognized as having a superior position from which to judge the facts. Thus, “credibility choices and the resolution of conflicting testimony are within the province of the court sitting without a jury, subject only to the clearly erroneous rule of Rule 52(a).”⁵² The rule recognizes this deference: “Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”⁵³ The implication is that the appellate court must apply the standard especially carefully when reviewing demeanor testimony.⁵⁴ This warning has been termed a stronger burden⁵⁵ or a “special reluctance.”⁵⁶

Despite the original intent that the clearly erroneous rule be applied to all types of evidence⁵⁷ and the plain language of the “due regard” caution, many courts have reversed the logic, allowing “clear error” to be more readily found for documentary evidence, undisputed testimony, and depositions. In those situations, early Fifth Circuit panels held that the rule did not apply at all⁵⁸ or that “the burden is

51. See Nangle, *supra* note 20, at 409-11, 418, 426-29; Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 779-81 (1957). *But see* Note, *supra* note 20, at 80-81, 84-85 (more recently trend is toward stricter and more uniform application, especially by Supreme Court and former Fifth Circuit). *See also supra* note 36 (inconsistency in applying Rule 52).

52. *Rodriguez v. Jones*, 473 F.2d 599, 604 (5th Cir.), *cert. denied*, 412 U.S. 953 (1973).

53. FED. R. CIV. P. 52(a).

54. *See Gypsum*, 333 U.S. at 394, 396.

55. *See Galena Oaks Corp. v. Scofield*, 218 F.2d 217, 219 (5th Cir. 1954).

56. FED. R. CIV. P. 52 advisory committee note of 1955, *quoted in* J. MOORE & J. LUCAS, *supra* note 25, ¶ 52.01[07] (unadopted amendment to Rule 52).

57. *See supra* notes 20-22 and accompanying text.

58. *See Frazier v. Alabama Motor Club, Inc.*, 349 F.2d 456, 458 (5th Cir. 1965). Other cases at the same time strictly applied the rule. *See, e.g., Welch*, 345 F.2d at 943-44.

lighter, much lighter," to show clear error.⁵⁹ Today the standard formula in the Eleventh and Fifth Circuits holds that, though the rule still applies where credibility is not involved, "the burden of establishing clear error is not so heavy, and the clearly erroneous rule is somewhat ameliorated. . . ."⁶⁰

The policy behind somewhat freer review in such situations, echoing the three-part standard formerly used in equity, is clear: the appeals court considers itself to sit in a vantage point as good as the trial court's. While the Supreme Court over the years has in practice and definition applied Rule 52(a) across-the-board, it has occasionally used dicta which support those declining to give up the demeanor distinction of old equity, noting that the rationale behind the rule is of less moment where the evidence is mostly documentary.⁶¹ Additionally, recent Court dicta seem to endorse fully the Eleventh Circuit's intermediate approach.⁶²

Extended review has, however, been strongly criticized for flip-flopping the intent of Rule 52(a) and usurping the trial court's function.⁶³ The approaches taken among and within the circuits are not always consistent,⁶⁴ and the Eighth Circuit has recently held that it is not

59. *Galena Oaks*, 218 F.2d at 219. See also *Pennsylvania T. & M. Mut. Cas. Co. v. Crapet*, 199 F.2d 850, 853 (5th Cir. 1952).

60. *Seaboard Coast Line Ry. Co. v. Trailer Train Co.*, 690 F.2d 1343, 1349 (11th Cir. 1982). See also *Onaway Transportation Co. v. Offshore Tugs, Inc.*, 695 F.2d 197, 200 (5th Cir. 1983); *Hague v. Liberty Mut. Ins. Co.*, 571 F.2d 262, 264 (5th Cir. 1978) ("somewhat lessened"); *Burston v. Caldwell*, 506 F.2d 24 (5th Cir.), cert. denied, 421 U.S. 990 (1975); *Sicula Oceanica, S.A. v. Wilmar Marine Eng. & Sales Corp.*, 413 F.2d 1332, 1333-34 (5th Cir. 1969) ("not as heavy").

61. See *United States v. General Motors Corp.*, 384 U.S. 127, 141-42 (1966).

62. *Bose Corp. v. Consumers Union of the United States*, ___ U.S. ___, 104 S. Ct. 1949, 1959 (1984). But in 1985 the Court reiterated strict application of the rule, even in paper cases. *Anderson v. City of Bessemer City*, ___ U.S. ___, 105 S. Ct. 71, 74 (1985).

63. See, e.g., Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 505-06 (1950) ("by a process almost inveterate in legal thinking, a negative was soon deduced as the opposite of the affirmations; and now the definitely erroneous gloss is being stated in place of the rule itself"). See generally Wright, *supra* note 51; Note, *Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence*, 49 VA. L. REV. 506 (1963). Even where the reviewing court is as competent, its function may not be to reinterpret a "cold" record. Note, *supra* note 20, at 90.

64. See Note, *supra* note 20, at 79-85. Presently the Supreme Court and most circuits endorse application of the rule regardless of the class of evidence. *Id.* at 79-80 & n.56. See generally *Anderson*, ___ U.S. at ___, 105 S. Ct. at 74.

bound at all by findings based on paper evidence.⁶⁵ Nevertheless, Professors Wright and Miller have noted a "marked trend" toward strict application of the rule to all fact findings.⁶⁶ The Eleventh and Fifth Circuit test has become relatively settled,⁶⁷ allowing a middle-ground approach in which the class of evidence may be considered, but the clearly erroneous rule still applies.

f. Verbatim Adoption

A special problem is presented when the district court's findings are directly adopted from a brief or submission of one party, since the reviewing court cannot see the discerning factors or be assured that the trial court has faced the conflicts inherent in adjudication. While the former Fifth Circuit "has consistently expressed its disapproval of the practice,"⁶⁸ it nonetheless applies Rule 52(a) to such findings, with a qualification similar to that used for documentary evidence. The court "can take into account the District Court's lack of personal attention to factual findings in applying the clearly erroneous rule."⁶⁹ Then the "appellate court can feel slightly more confident in concluding that important evidence has been overlooked or inadequately considered"⁷⁰

65. *Gay Lib v. University of Mo.*, 558 F.2d 848, 853 n.10 (8th Cir. 1977), *reh'g denied*, 434 U.S. 1080 (1978).

66. 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2587, at 748-49 (1971).

67. Note, *supra* note 20, at 84-85. The circuit's position has been repeatedly invoked despite the Supreme Court's generally broad reading of the clear error rule expressed recently in *Swint*, 456 U.S. 273 (1982). The flexible review given nondemeanor evidence, however, is put forth as a variation on, not an abrogation of, Rule 52, so that it is apparently distinguished from the discredited "ultimate facts" exception. See *infra* text accompanying notes 87-93. Pre-*Swint* cases do not always carefully distinguish the two situations, leaving it unclear whether the freer review was based on paper evidence or on inferences which the appellate court was entitled to draw. See, e.g., *Galena Oaks*, 218 F.2d at 219. Now, however, the court apparently sees its demeanor variation as permissible and separate from the prior review given inferences.

68. *Keystone Plastics, Inc. v. C&P Plastics, Inc.*, 506 F.2d 960, 962 (5th Cir. 1975).

69. *Amstar v. Domino's Pizza, Inc.*, 615 F.2d 252, 258 (5th Cir.), *cert. denied*, 449 U.S. 899 (1980). See also *Wilson v. Thompson*, 593 F.2d 1375, 1384 n.16 (5th Cir. 1979); *Volkswagen of America, Inc. v. Jahre*, 472 F.2d 557, 559 (5th Cir. 1973).

70. *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 314 n.1 (5th Cir. 1977)(quoting *Louis Dreyfus & Cie. v. Panama Canal Co.*, 298 F.2d 733, 738 (5th Cir. 1962)), *cert. denied*, 434 U.S. 1034 (1978). For a thorough discussion of the problems and permissible uses of mechanical adoptions, see *Ramey Construction Co. v.*

Other circuits, including the First and Ninth, turn an even more critical appellate eye.⁷¹ But the Supreme Court's early observations are consistent with the present Eleventh Circuit approach: "The findings leave much to be desired in light of the function of the trial court. But they are nonetheless the findings of the District Court. And they must stand or fall depending on whether they are supported by evidence. We think they are."⁷² The courts may be more willing to accept (or otherwise to reject) adopted findings in cases involving highly technical facts.⁷³ On the other hand, future courts may be more reluctant to accept findings adopted by a special master; cases often emphasize the special burdens on district judges, adoption thwarts the purpose of a special reference, and the appellate court may flinch at facing two levels of verbatim adoption.

g. No Findings and Faulty Findings

Where the district court has failed to make Rule 52 findings, the Supreme Court has noted that

the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings. . . . Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue.⁷⁴

In the Eleventh Circuit a similar rule has been applied to inadequate or conclusory findings which do not reveal the trial court's analytical process. In such a case, remand for more specific findings is routine, but "[t]his failure is merely a hindrance and not a fatal error," since the appellate court can make the factual collation, in the interest

Apache Tribe, 616 F.2d 464 (10th Cir. 1980).

71. See, e.g., *In re Las Colinas, Inc.*, 426 F.2d 1005, 1008-10 (1st Cir. 1970) ("maximum doubt"). Cf. *Heterochemical Corp. v. United States Rubber Co.*, 368 F.2d 169 (7th Cir. 1966) (calling it a "practical and wise custom").

72. *United States v. Crescent Amusement Co.*, 323 U.S. 173, 185 (1944). See also *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 n.4 (1964).

73. See *In re Las Colinas, Inc.*, 426 F.2d at 1009-10 (such as patent appeals).

74. *Swint*, 456 U.S. at 291-92 (1982). Cf. *Mason v. Balkcom*, 531 F.2d 717 (5th Cir. 1976) (harmless error for failure to find facts specially). See generally 5A J. MOORE & J. LUCAS, *supra* note 25, § 52.06[2] (1982), cited in *Swint*, 456 U.S. at 292 n.22. For fact findings based on legal error, see *infra* text accompanying notes 83-85. See also *Swint*, 456 U.S. at 298-99 (Marshall, J., dissenting).

of judicial economy, where the record fully establishes the pertinent facts.⁷⁵ Chief Judge Godbold of the Eleventh Circuit has observed that “[c]ourts of appeals, at least those in the federal system, are properly capable of making findings of fact in a broad range of circumstances, and in practice they actually do so.”⁷⁶ Nevertheless, the Supreme Court’s recent reminder that remand to the fact-finding body is the normally appropriate procedure may check the circuit’s use or development of fact-finding economies.

2. Conclusions of Law

a. Errors: Law or Fact?

Errors of law are not insulated by the clearly erroneous rule and are freely reviewable.⁷⁷ Such a statement is not very helpful since the threshold question, whether the finding is factual or a legal conclusion, depends on the case law on that issue and, at times, the facts of the case.⁷⁸ The cases offer little general guidance into the fact-law distinction beyond specific determinations in individual situations. Justice Brennan offers that fact questions are those for which resolution is “based ultimately on the application of the fact-finding tribunal’s expe-

75. *Continental Oil Co. v. Cole*, 634 F.2d 188, 191 (5th Cir.) (quoting *Whitley v. Road Corp.*, 624 F.2d 698, 700 (5th Cir. 1980)), *cert. denied*, 454 U.S. 830 (1981). Even after *Swint*, the circuit has found appellate fact-finding to be proper and necessary in appropriate circumstances. *See, e.g.*, *Scott v. Wainwright*, 698 F.2d 427, 429 (11th Cir. 1983). *See also* *Pegues v. Mississippi State Employment*, 699 F.2d 760, 766 n.7 (5th Cir.), *cert. denied*, ___ U.S. ___, 104 S. Ct. 482 (1983); *United States v. Ga. Power Co.*, 695 F.2d 890 (5th Cir. 1983).

76. Godbold, *Fact Finding by Appellate Courts—An Available and Appropriate Power*, 12 CUMB. L. REV. 365, 365 (1982). Chief Judge Godbold surveys the appellate fact-finding function, including receiving new evidence, and discusses its propriety, economies, and limits.

77. *E.g.*, *Swint*, 456 U.S. at 287; *Gypsum*, 333 U.S. at 394; *United States v. Richberg*, 398 F.2d 523, 529 (5th Cir. 1968). Appellate courts are foremost, of course, law courts. For example, the question whether specific conduct is constitutionally protected is ultimately an issue of law. *See generally* *Neil v. Biggers*, 409 U.S. 188, 193 n.3 (1972).

For the principles underlying the “rule of law” controlling in any case, especially panel *stare decisis*, see *infra* notes 348-54 and accompanying text.

78. *See generally* 5A J. MOORE & J. LUCAS, *supra* note 25, ¶ 52.03[1] n.26. *See infra* text accompanying notes 98-132 for various law, fact, and “mixed” categorizations used in the former Fifth Circuit and in the Eleventh Circuit.

rience with the mainsprings of human conduct. . . ."⁷⁹ Judge Friendly has observed, "what a court can determine better than a jury [is] perhaps about the only satisfactory criterion for distinguishing 'law' from 'fact.'"⁸⁰

b. State Law and Foreign Law

Federal courts defer, of course, to interpretations of state law by state courts, especially the state's highest court. Where no controlling precedent exists, the court is to decide the case as it believes the state courts would.⁸¹ Although review of a district court's construction of law is normally an unbounded job of the appellate court, some courts note their deference to an interpretation made by a district judge experienced in the law of the state in which he or she sits.⁸² Rule 44.1 provides for the use of foreign law in the district courts, allowing them to consider broad sources in determining it. "The court's determination shall be treated as a ruling on a question of law."⁸³

79. *Dubenstein*, 363 U.S. at 289. See also L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 548 (1965); *NLRB v. Marcus Trucking Co.*, 286 F.2d 583 (2d Cir. 1961). See *infra* note 292.

80. *United States v. J.B. Williams Co.*, 498 F.2d 414, 431 (2d Cir. 1974).

81. See *Green v. Amerada-Hess Corp.*, 612 F.2d 212, 214 (5th Cir.), *cert. denied*, 449 U.S. 952 (1980). Thus, federal courts are not bound by intermediate state court rulings if they are convinced that the highest court of the state would decide otherwise. See *Comm'r v. Bosch's Estate*, 387 U.S. 456 (1967). The latest and most authoritative expression of state law applicable to the facts of the case controls. See *Delta Air Lines, Inc. v. McDonnell Douglas Corp.*, 503 F.2d 239, 245 (5th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975). See also *Patch v. Stanley Works*, 448 F.2d 483, 488 (2d Cir. 1971)(proper to refer to "majority rule" when applicable state law is uncertain).

The Supreme Court has approved certification for determination of state law where the state so provides. *Lehman Bros. v. Schein*, 416 U.S. 386, 389 (1974). The procedure "helps build a cooperative judicial federalism." *Id.* at 391.

82. *E.g.*, *Freeman v. Continental Gin Co.*, 381 F.2d 459 (5th Cir. 1967). See also *Rudd-Melikian, Inc. v. Merritt*, 282 F.2d 924, 929 (6th Cir. 1960)(district court's "permissible" construction of state law in diveristy cases is to be accepted even though the reviewing court disagrees). *Cf.* *Gee v. Tenneco, Inc.*, 615 F.2d 857, 861 (9th Cir. 1980)(district judge not overruled on question of state law unless "clearly wrong").

83. FED. R. CIV. P. 44.1. The Advisory Notes specifically recognize that the final sentence makes inapplicable the clearly erroneous rule.

c. Findings Based on Faulty Law

Findings of fact based on an erroneous view of the law or an incorrect legal standard are not binding on the appellate court.⁸⁴ Although this rule has been standard in the circuit, it was not always clear whether the courts were "freely reviewing" such findings or whether the findings were, because of the mistake of law, "clearly erroneous." An early case implied the latter—that the rule is another facet of Rule 52.⁸⁵ But most cases, especially recently, find that in such a situation Rule 52 insulation no longer applies.⁸⁶

d. Inferences and "Ultimate Facts"

Although the cases were by no means uniform, the former Fifth Circuit traditionally considered itself as free to reject findings of "ultimate fact" or inference as where the error was one of law.⁸⁷ Where the district court's error goes to the heart of the legal issue, it was argued, the finding, though ostensibly one of fact, should not be protected. This doctrine was first adopted and defined by the court in *Galena Oaks Corporation v. Scofield*: "Insofar . . . as the so-called 'ultimate fact' is simply the result reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary [or 'subsidiary'] facts, it is 'subject to review free of the restraining impact of the so-called 'clearly erroneous' rule.'"⁸⁸ One court has observed that the

84. See, e.g., *Swint*, 456 U.S. at 287; *Franks*, 414 F.2d at 684; *United States v. Richberg*, 398 F.2d 523, 529 (5th Cir. 1968). Remand is the usual course for further fact-finding under the corrected legal test. *Swint*, 456 U.S. at 291-93. See *supra* notes 74-76 and accompanying text.

85. See *Chaney v. City of Galveston*, 368 F.2d 774, 776 (5th Cir. 1966).

86. See, e.g., *Lincoln*, 697 F.2d at 939-40 (if taints findings); *Manning v. M/V Sea Road*, 417 F.2d 603, 607 (5th Cir. 1969). See also *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419, 422 (5th Cir. 1980) ("no deference"), *vacated on other grounds*, 451 U.S. 902 (1981).

87. See, e.g., *United States v. Grayson County State Bank*, 656 F.2d 1070, 1075 (5th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982); *Danner v. United States Civil Service Comm'n*, 635 F.2d 427, 430-31 (5th Cir. 1981); *American Nat'l Bank v. United States*, 421 F.2d 442, 451 (5th Cir.) (ultimate issue inherently one of law), *cert. denied*, 400 U.S. 819 (1970); *Bullock v. Tamiami Trail Tours, Inc.*, 266 F.2d 326, 330 (5th Cir. 1959).

88. 218 F.2d 217, 219 (5th Cir. 1954) (quoting *Lehmann v. Acheson*, 206 F.2d 592, 594 (3d Cir. 1953)). Broad factual inferences were regarded as "ultimate facts" and thus treated as a question of law. Inferences were also often involved in the less stringent review given documentary evidence but were more likely to be analyzed, espe-

doctrine may be "understood best as an abortive attempt to resolve the law/fact dilemma by making that elusive distinction less determinative."⁸⁹ But even within the circuit the effort was criticized. One court cautioned that while "subjecting inferences or ultimate facts to a broader review is not novel," the clear error rule "is not to be discarded."⁹⁰

The doctrine is "abortive" because "[t]he Supreme Court has levelled it."⁹¹ In *Pullman-Standard v. Swint*, the Court, noting that Rule 52 "does not divide facts into categories,"⁹² rejected the former Fifth Circuit doctrine and its distinction between subsidiary and ultimate facts. Today the doctrine is no longer viable, though its concepts and result may continue to affect or survive in related areas.⁹³

cially recently, as falling within the ultimate fact doctrine. See *supra* note 67.

To say that such inferences are "legal" does not, of course, resolve the conceptual blending. Compare *Bullock*, 266 F.2d at 330 (appears to distinguish inference from ultimate fact), with *American Nat'l Bank*, 421 F.2d at 451 (no distinction offered). One discussion of the nature of an inference may prove lasting:

Insofar as any weighing of inferences from given facts is permissible, the task of the court is not to weigh these against each other but rather to cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness, casting aside those which do not meet it and focusing solely on those which do. If a frog be found in the party punch bowl, the presence of a mischievous guest—but not the occurrence of spontaneous generation—may reasonably be inferred.

American Telephone & Telegraph Co. v. Delta Communications Corp., 590 F.2d 100, 102 (5th Cir. 1979).

89. *Byram v. United States*, 705 F.2d 1418, 1423 (5th Cir. 1983)(footnote omitted)(tracing the doctrine from *Galena Oaks* through *Swint*). It may also be noted that over the years the doctrine has often been invoked in discrimination cases. See *Lincoln*, 697 F.2d at 940.

90. *United States v. Makris*, 535 F.2d 899, 907 (5th Cir. 1976)(citations omitted), *cert. denied*, 430 U.S. 954 (1977).

91. *Byram*, 705 F.2d at 1422.

92. 456 U.S. at 287. *Swint* held that the trial court's finding of no discriminatory intent in a section 703(h) case was a fact reversible only if clearly erroneous. See generally Calleros, *Title VII and Rule 52(a): Standards of Appellate Review in Disparate Treatment Cases*, 58 TUL. L. REV. 403 (1983).

93. See *supra* note 88. It is not clear after *Swint*, for example, whether some inferences will be distinguished from ultimate fact and treated as issues of law. The debate may, for now, be subsumed under the "mixed question" issue, especially since some cases characterized inferences as mixed questions. But a recent Fifth Circuit opinion, citing *Swint*, found "neither the facts found by the district court nor the inferences drawn by it to be clearly erroneous." *Cormier v. P.P.G. Industries, Inc.*, 702 F.2d

e. Mixed Law-Fact Findings

The *Swint* Court reserved the question whether its ruling affected "mixed" questions of law and fact "of the kind that in some cases may allow an appellate court to review the facts to see if these facts satisfy some legal concept of discriminatory intent."⁹⁴ It may be argued, of course, that a trial court has committed *legal error* if its findings do not satisfy a legal standard. In the Eleventh Circuit, review of mixed questions generally is broad, "allowing us to substitute our own judgment for that of the lower court."⁹⁵ Mixed questions of fact and law are not, as a general matter, reviewable under the clearly erroneous standard.⁹⁶ Some courts have held, however, that while Rule 52 is normally not applicable to mixed questions, it would be applied in the pre-

567, 568 (5th Cir. 1983). Where the disputed finding is a purely legal conclusion drawn from the facts, however, the issue is one of law and is freely reviewed, even under *Swint*. See *infra* note 96.

94. 456 U.S. at 289. The Court added:

We need not, therefore, address the much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact—i.e., questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated. There is substantial authority in the circuits on both sides of this question.

Id. at 289 n.19. See *Gypsum*, 333 U.S. at 396. See also *infra* text accompanying note 125.

It is not always so easy to distinguish between mixed questions and ultimate facts, and many cases applied them interchangeably. See *Washington v. Watkins*, 655 F.2d 1346, 1352 n.4 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982). See also *Swint*, 456 U.S. at 286 n.16. *Swint* limited its notion of "ultimate fact" to those *decisive* to a trial issue, unmixed with law. The definitions *Swint* provides may help subsequent courts make the distinction, however, and it is likely that the cases equating them will not be used. But even the courts recognizing a line may find drawing it to be a troublesome task. See *Junior v. Texaco, Inc.*, 688 F.2d 377, 279 (5th Cir. 1982) ("Serbonian bog").

95. *Baty v. Balkcom*, 661 F.2d 391, 394 n.7 (5th Cir. 1981) (citing *Baker v. Metcalfe*, 633 F.2d 1198, 1201 (5th Cir.), *cert. denied*, 451 U.S. 974 (1981)), *cert. denied*, 456 U.S. 1011 (1982). See *Shawgo v. Spradlin*, 701 F.2d 470, 482 n.13 (5th Cir. 1983) ("greater mixed law-fact scope of review"); *Gomez v. Beto*, 462 F.2d 596, 597 (5th Cir. 1972) ("court erred as a matter of law in ruling that the undisputed facts failed to constitute ineffective assistance").

96. *Washington*, 655 F.2d at 1352-53. Accord *Barrientos v. United States*, 668 F.2d 838 (5th Cir. 1981). See 9 C. WRIGHT & A. MILLER, *supra* note 66, § 2589, at 753 (1971). But see *Funding Systems Leasing Corp. v. Pugh*, 530 F.2d 91 (5th Cir. 1976) (clear error test applies to some mixed questions); *Pennsylvania Cas. Co. v. McCoy*, 167 F.2d 132 (5th Cir. 1948).

sent case since fact questions predominated.⁹⁷

f. Law, Fact, or Mixed?

Whether the substantive issue in a particular case is termed a question of fact, law, or a mixture of fact and law is often a difficult but linchpin issue under Rule 52(a). That initial determination seems to be in the hands of the appellate court, since it will often ignore the characterization used by the trial court.⁹⁸ At times, however, the circuit has expressed its willingness to consider the trial court's classification of its findings as one factor—though not a determinative one—to use in the appellate court's initial characterization task.⁹⁹ The Supreme Court in *Swint* recognized the “vexing nature of the distinction[s]”¹⁰⁰ and noted that Rule 52 does not draw the line between law and fact. In some areas, however, the circuit has fixed the line, and often in the process has joined or created a conflict among the circuits.¹⁰¹ In others, reference to comparable situations—or the compelling facts of the case at hand—may offer guidance for future decisions.

i. Trademarks and Patents

In trademark law, the issue of likelihood of confusion is a question of fact, subject to Rule 52(a).¹⁰² Likewise, the classification of a trademark term (as generic, descriptive, etc.) is a fact.¹⁰³ A recent court held that a district court's finding of no profits in the area of trademark infringement was not clearly erroneous.¹⁰⁴ Patent validity is a question of law, as is the test of obviousness, but the factual underpinnings of

97. See *Connally v. Transcon Lines*, 583 F.2d 199 (5th Cir. 1978); *Backar v. Western States Producing Co.*, 547 F.2d 876, 884 (5th Cir. 1977).

98. See, e.g., *Baumgartner v. United States*, 322 U.S. 665, 671 (1944); *East v. Romine*, 518 F.2d 332, 338-39 (5th Cir. 1975); *Ruby v. American Airlines, Inc.*, 329 F.2d 11, 23 (2d Cir. 1964) (Friendly, J., dissenting), *vacated sub nom. O'Connell v. Manning*, 381 U.S. 277 (1965).

99. E.g., *Lewis v. S.S. Baune*, 534 F.2d 1115, 1119 (5th Cir. 1976).

100. 456 U.S. at 288. See *supra* notes 77-80, 89 and accompanying text.

101. The “fixed” lines may, of course, be adjusted as *Swint* makes its impact, though many tests cited below were decided or reaffirmed after *Swint*.

102. *Amstar Corp. v. Domino's Pizza, Inc.* 615 F.2d 252, 258 (5th Cir.), *cert. denied*, 449 U.S. 899 (1980). It is characterized as law, fact, and mixed in other circuits. See *id.* at 257-58.

103. *Vision Center v. Opticks, Inc.*, 596 F.2d 111, 113 (5th Cir. 1979).

104. *St. Charles Mfg. Co. v. Mercer*, 719 F.2d 380 (11th Cir. 1983).

such findings are entitled to clear error review.¹⁰⁵ Although infringement and equivalence are facts, construction of a patent is a legal issue.¹⁰⁶ Few patent appeals remain for the regular circuits,¹⁰⁷ but the doctrine may be useful for illustration and related application.

ii. Contracts and Business Situations

A recent case applied Rule 52 to a finding regarding what the contracting parties did not intend.¹⁰⁸ Contract interpretation, on the other hand, is a question of law,¹⁰⁹ as is the preliminary question of whether an ambiguity exists.¹¹⁰ Treated as fact questions are agency status,¹¹¹ bailment relationship,¹¹² and breach of warranty.¹¹³

105. *See Steelcase, Inc. v. Delwood Furniture Co.*, 578 F.2d 74, 78 (5th Cir.), *cert. denied*, 440 U.S. 960 (1978).

106. *See Continental Oil Co. v. Cole*, 634 F.2d 188, 198 (5th Cir.), *cert. denied*, 454 U.S. 830 (1981). Cases such as *Cole* hold, however, that equivalence—normally a fact—is a legal issue, or perhaps a mixed question, where patent construction is involved. *See Weidman Metal Masters Co. v. Glass Master Corp.*, 623 F.2d 1024, 1030 (5th Cir. 1980), *cert. denied*, 450 U.S. 982 (1981).

107. *See Farmhand, Inc. v. Anel Eng'g Indus., Inc.*, 693 F.2d 1140, 1141 (5th Cir. 1982). Appeal would now be had to the recently created Federal Circuit in the District of Columbia.

108. *See Paragon Resources, Inc. v. Nat'l Fuel Gas Dist. Corp.*, 695 F.2d 991 (5th Cir. 1983). *See also infra* text accompanying note 115. Another recent case, however, noted: "The determination of the parties' intentions, as revealed solely by the contract, is but another form of contract interpretation, and therefore constitutes a question of law. Only when the contract is ambiguous does determination of the parties' intent involve a question of fact." *City of Austin v. Decker Coal Co.*, 701 F.2d 420, 426 n.18 (5th Cir. 1983)(citation omitted).

Whether a contract was formed, it may be argued, is a legal conclusion based on factual findings, including the parties' intent.

109. *Strachan Shipping Co. v. Dresser Indus., Inc.*, 701 F.2d 483, 486 (5th Cir. 1983)("clearly erroneous standard does not apply"); *City of Austin*, 701 F.2d at 425.

110. *City of Austin*, 701 F.2d at 425-26. *See also Freeman v. Continental Gin Co.*, 381 F.2d 459, 465 (5th Cir. 1967)(summary judgment context).

111. *Strachan*, 701 F.2d at 487. But the existence of a fiduciary duty has been termed, in a summary judgment setting, a legal question. *See Lewis v. Knutson*, 699 F.2d 230 (5th Cir. 1983). Similarly, the materiality question in federal fraud cases is a mixed fact-law inquiry, as found in the summary judgment context, *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976), though the Ninth Circuit still applies Rule 52 on review.

112. *T.N.T. Marine Servs. v. Weaver Shipyards & Dry Docks, Inc.*, 702 F.2d 585 (5th Cir. 1983).

113. *Martin v. Xarin Real Estate, Inc.*, 703 F.2d 883 (5th Cir. 1983).

iii. Discrimination and Intent Cases

Swint made clear that in that case discriminatory purpose under Title VII is a pure question of fact.¹¹⁴ Indeed, "[t]reating issues of intent as factual matters for the trier of fact is commonplace."¹¹⁵ The Court noted that it has treated as fact purposeful school segregation, gift motive (and ultimately whether a gift was made) under the tax code, and intent in antitrust.¹¹⁶ Additionally, a finding of "no retaliation" is likewise a "final fact."¹¹⁷ In the Eleventh Circuit, even a finding that the plaintiff has not made out his *prima facie* case of discrimination is reviewed only for clear error.¹¹⁸

The doctrine of constructive discharge, used in discrimination and labor cases, poses a more difficult inquiry. Pre-*Swint* Title VII cases treated the issue inconsistently. One court "appl[ie]d the facts as found by the district court to the law of constructive discharge" in holding that "[a]s a matter of law the facts involved here do not constitute constructive discharge."¹¹⁹ Another case, however, applied the clear error rule.¹²⁰

Since *Swint*, the Fifth Circuit has noted the standard-of-review inconsistency and discussed the applicability of Rule 52. It may be argued, of course, that constructive discharge fits into the Supreme Court's reserved definition of "mixed" questions. In *Junior v. Texaco, Inc.*, the new Fifth Circuit found it unnecessary in that case to resolve the issue and expressly reserved the inquiry.¹²¹ It is now probable, how-

114. 456 U.S. at 286-89. See also *Fowler v. Blue Bell, Inc.*, 737 F.2d 1007, 1012 (11th Cir. 1984); *Hill v. K-Mart Corp.*, 699 F.2d 776 (5th Cir. 1983).

115. 456 U.S. at 288.

116. See *id.* Following these observations, the new Fifth Circuit has ruled that the holding purpose of a taxpayer is a fact, and the issue is not less so simply because the taxpayer's state of mind is not controlling. *Byram*, 705 F.2d at 1418.

117. *McMillan v. Rust College, Inc.*, 710 F.2d 1112, 1116 (5th Cir. 1983).

118. *Jones v. Lumberjack Meats, Inc.*, 680 F.2d 98, 101 (11th Cir. 1982), *criticized in* Calleros, *supra* note 92, at 437.

119. *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 64 (5th Cir. 1980). Framed in this way, the inquiry sounds much like the definition of mixed questions the *Swint* Court used to distinguish ultimate fact. See *supra* notes 92-93. See also *Calcote v. Texas Educ. Found.*, 578 F.2d 95, 97, 98 (5th Cir. 1978) ("conclusion of law").

120. See *Meyer v. Brown & Root Const. Co.*, 661 F.2d 369, 372 (5th Cir. 1981). Although categorization of the issue has varied, the substantive legal definition of "constructive discharge" in the Eleventh Circuit is consistently stated. E.g., *Bourque*, 617 F.2d at 65.

121. 688 F.2d 377, 379-80 (5th Cir. 1982). The new Fifth Circuit concluded that the finding of no discharge was neither legal error nor clear error. *Accord Shawgo*, 701

ever, that constructive discharge is either a fact or fact-law.

iv. Tort and Admiralty

Findings of negligence *vel non* have been categorized as fact questions in cases involving admiralty¹²² and federal¹²³ law. Likewise, the court's apportionment of fault is subject to the clearly erroneous standard.¹²⁴ Causation, even including the "legal" concept of proximate cause, is treated as fact.^{124.1}

v. Employee Status

The final conclusion that one is an "employee" (or "employer") under the Fair Labor Standards Act (F.L.S.A.) is a legal determination. One court's statement of this characterization may shed light on the newer definitions of "mixed" questions and reveal how the circuit will generally analyze ultimate "legal" determinations under *Swint*:

We review the district court's determination as being one of mixed law and fact. As to the trial court's underlying factual findings and factual inferences deduced therefrom, we are bound by the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure. However, as to the legal conclusion reached by the district court based upon this factual data, i.e., here that these welders are employees rather than independent contractors, we may review this as an issue of law.¹²⁵

F.2d at 470.

122. *E.g.*, *Verrett v. McDonough Marine Service*, 705 F.2d 1437 (5th Cir. 1983)(negligence and contributory negligence); *Inland Oil & Trans. Co. v. Ark-White Towing Co.*, 696 F.2d 321 (5th Cir. 1983).

123. *See Brooks v. United States*, 695 F.2d 984 (5th Cir. 1983). *Cf. SEC v. Geon Indus., Inc.*, 531 F.2d 39, 53 (2d Cir. 1976). *See also J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964)(causation is a question of fact to be decided at trial (§ 14(a) securities case)); *McAllister v. United States*, 348 U.S. 19 (1954).

124. *Harbor Tug and Barge v. Belcher Towing*, 733 F.2d 823 (11th Cir. 1984). *Cf. Verrett*, 705 F.2d at 1443 (citing *Reyes v. Vantage S.S. Co.*, 672 F.2d 556 (5th Cir. 1982)).

124.1 Proximate cause in admiralty law is generally treated as fact, *Consolidated Grain & Barge Co. v. Marcona Conveyor Corp.*, 716 F.2d 1077, 1082 (5th Cir. 1983); *Cheek v. Williams-McWilliams Co.*, 697 F.2d 649 (5th Cir. 1983), as is seaman status under the Jones Act, at least in the summary judgment context. *See Holland v. Allied Structural Steel Co.*, 539 F.2d 476 (5th Cir. 1976), *cert. denied*, 429 U.S. 1105 (1977).

125. *Robicheaux v. Radcliff Material Inc.*, 697 F.2d 662, 666 (5th Cir. 1983)(ci-

Judge Higginbotham has expressed his concern with this approach:

Our efforts to justify appellate review by attempting to separate intertwined subsidiary facts and ultimate legal conclusions inevitably cast surrealistic shadows. The exercise can, and occasionally does, do little more than serve as a covering cape for the exercise of the trial court function by an appellate court.¹²⁶

Although the F.L.S.A. "employee" or "employer" determinations are often held to be ultimately a legal issue (following an analysis mixing law and fact), some cases rule to the contrary, holding the statutory "employer" issue to be one of fact, and, therefore, subject to Rule 52.¹²⁷ A more recent panel, however, has noted the circuit's inconsistent treatment and determined that the most precise labeling makes the "employer" conclusion legal while basing it on underlying findings of fact, such as indicia of control.¹²⁸ This court follows "the substantial line of authority" in terming it ultimately a legal question.¹²⁹ It may be argued, however, that the apparently smaller line of precedent (holding the question to be fact) is more consistent with the spirit of *Swint*.

tation omitted). *Accord* *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 471 (11th Cir. 1982). *See* *Castillo v. Givens*, 704 F.2d 181 (5th Cir.), *cert. denied*, ___ U.S. ___, 104 S. Ct. 160 (1983).

126. *Castillo*, 704 F.2d at 199 (Higginbotham, J., concurring). It may be argued, however, that most legal issues are shaded by case facts, leaving the appellate court with little reviewing authority if legal conclusions are practically finalized at trial. Moreover, the analysis of "mixed" questions offered by the *Castillo* majority seems at least compatible with the Supreme Court's definition of a mixed question as one in which "the issue is whether the [established historical] facts satisfy the statutory standard." *Swint*, 456 U.S. at 289 n.19.

127. *E.g.*, *Hodgson v. Griffin & Brand*, 471 F.2d 235, 238 (5th Cir.), *cert. denied*, 414 U.S. 819 (1973); *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668, 669-70 (5th Cir. 1968).

128. *Castillo*, 704 F.2d at 187 n.12. This panel writes that the confusion originated from the Supreme Court's characterization of the issue as "essentially a question of fact" in another context, but reconciles that language with *Castillo*'s mixed fact-law analysis. *See supra* text accompanying note 125.

129. *Id.* It may be noted, however, that while *Castillo* cites several cases characterizing the employer issue as one of law excluded from Rule 52 and discusses three contrary cases, in *Castillo* itself the issue does not arise in the Rule 52 context. *See infra* note 163.

vi. Adequate Criminal Representation: Habeas

The adequacy of representation issue over the years has not been consistently classified in habeas appeals to the former Fifth Circuit, the cases finding the question to be fact, law, and fact-law. In *Washington v. Watkins*, the Fifth Circuit discussed the various interpretations and concluded that the issue is a mixed question, allowing the appeals court an independent determination of the final legal conclusion of effectiveness.¹³⁰ The specific finding that a lawyer's choice was or was not strategic, on the other hand, is a fact to be accepted unless clearly erroneous.¹³¹ The substantive test of constitutional adequacy of counsel has also consistently been in controversy.¹³²

130. 655 F.2d 1346, 1351-54 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982). *Accord* Strickland v. Washington, ___ U.S. ___, 104 S. Ct. 2052 (1984); Armstead v. Maggio, 720 F.2d 894, 896 (5th Cir. 1983). *Watkins* discusses generally the various characterizations given to other findings in the habeas setting, including constitutionality of identification procedures and sufficiency of the evidence. *See* 655 F.2d at 1353 n.9. *Cf.* Sumner v. Mata, 449 U.S. 539 (1981)(presumption of correctness for state court written findings of fact).

Also in the criminal context, some cases apply a clearly erroneous rule to fact findings in criminal hearings. *E.g.*, United States v. Medel, 592 F.2d 1305, 1317 (5th Cir. 1979)(whether writing is "statement" under Jencks Act); United States v. Watson, 591 F.2d 1058, 1061 (5th Cir. 1979)(voluntariness of confession). These cases are not clear as to how this standard found its way into the criminal law. *E.g.*, United States v. Vasilios, 598 F.2d 387, 392 (5th Cir. 1979)(credibility calls at suppression hearing subject to "normal" clear error standard). *Cf.* United States v. Hayes, 589 F.2d 811, 822-23 (5th Cir.)(citing both "clearly arbitrary" and "clear error" tests for competence), *cert. denied*, 444 U.S. 847 (1979).

131. *Washington v. Strickland*, 693 F.2d 1243, 1257 n. 24 (5th Cir. 1982)(en banc)(Unit B), *rev'd on other grounds*, ___ U.S. ___, 104 S. Ct. 2052 (1984). The reasonableness of that strategic choice, as based on certain assumptions, is also a fact question. *Id.* at 1256 n.23. *See also* *Washington v. Watkins*, 655 F.2d at 135 ("basic" or "historical" facts underlying conclusion of effectiveness are subject to Rule 52).

132. Within the Eleventh Circuit, the issue of effectiveness—and such subissues as the duty to investigate and the prejudice determination—have more than once warranted en banc consideration. *See generally* Comment, *A Coherent Approach to Ineffective Assistance of Counsel Claims*, 71 CALIF. L. REV. 1516 (1983).

B. Findings in a Jury Trial

1. The Verdict

a. Requirement of Evidentiary Basis: General Review Principles

Although the Founding Fathers granted the Supreme Court "appellate jurisdiction, both as to Law and Fact,"¹³³ that power was checked by the seventh amendment: "[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."¹³⁴ Jury facts are, in reality, re-examined. A jury verdict cannot stand without an evidentiary basis. Whether that basis is adequate to support the verdict has historically been determined by a "substantial evidence" measure.¹³⁵ In the Eleventh Circuit, the requirement of substantial evidence is in turn tested by a "reasonable conflict" or "reasonable juror" standard.¹³⁶

The issue usually is presented on an appeal as review of the district judge's decision on a motion for judgment n.o.v., or of the granting of a directed verdict where the issue is not submitted to the jury.¹³⁷ In the directed verdict situation, review is judged as well by the test of reasonableness, in this case framed in terms of a requirement that a fact issue be submitted if reasonable men could differ on the conclu-

133. U.S. CONST. art. III, § 2. The courts of appeal are given similar authority. See 28 U.S.C. §§ 1291, 1292 (1982).

134. U.S. CONST. amend. VII. Juries were seen as the citizen's protection from an autocratic and centralized chancery court. See Clark & Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190, 192 (1937).

135. See, e.g., *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891)(jury fact-finding to be accepted unless no substantial evidence supports); *Comfort Trane Air Conditioning v. Trane Co.*, 592 F.2d 1373, 1383 (5th Cir. 1979).

A "substantial evidence" standard is also used to review most jury verdicts in criminal cases. *United States v. Malatesta*, 590 F.2d 1379, 1382 (5th Cir.)(en banc), cert. denied, 440 U.S. 962 (1979). See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488-91 (1951)(fact-findings in formal administrative actions). This is defined, in both contexts, by a test of reasonableness. E.g., *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). See also *supra* note 44 and accompanying text.

136. E.g., *Helene Curtis Indus. v. Pruitt*, 385 F.2d 841, 850 (5th Cir. 1967)(judge erred in not directing verdict or granting j.n.o.v.), cert. denied, 391 U.S. 913 (1968). The court appears to frame the reasonableness test as an application of the substantial evidence requirement, and no suggestion is made that two different tests are actually involved.

137. See *infra* note 180 and accompanying text. Thus the same standard used to review the verdict is applied to certain decisions by the trial judge concerning the reasonableness of the verdict or a potential verdict, despite the procedural techniques used.

sions to be reached from the evidence presented.¹³⁸ A frequently-quoted passage from *Liberty Mutual Insurance Company v. Falgoust*¹³⁹ summarizes the court's general approach to a verdict:

We have said that if there were no evidentiary basis for the jury's verdict, it cannot be permitted to stand, and that the standard for reviewing a jury verdict is whether the state of the proof is such that reasonable and impartial minds could reach the conclusion the jury expressed in its verdict. The jury is, of course, the traditional finder of facts, and its verdict must stand unless appellant can show that there is no substantial evidence to support it, considering the evidence in the light most favorable to appellees, and clothing it with all reasonable inferences to be deduced therefrom.¹⁴⁰

The verdict is affirmed "where there is reasonable basis in the record" such that the "conclusion could, with reason, be reached on the evidence."¹⁴¹

b. *Boeing*: Rejection of "Scintilla" Rule

A verdict requires an evidentiary basis. But is the converse true? Must the verdict stand if there is some basis, and how much evidence is "substantial"? A conflict developed within the circuit over whether, in applying the substantial evidence test, the reviewing court is to accept a verdict if *some* evidence supports it. The conflict is alternatively framed by the question whether the appellate court looks to one side of the facts only. On this question the circuits have disagreed, and the Supreme Court has not said "yes" or "no" recently on the issue. But in 1969 the en banc Fifth Circuit, in *Boeing Company v. Shipman*,¹⁴² rejected the "complete absence of probative facts" standard formerly applied to general civil appeals.¹⁴³ The court articulated the proper test:

138. See, e.g., *Helene Curtis*, 385 F.2d at 850.

139. 386 F.2d 248 (5th Cir. 1967)(affirming judge's denial of a directed verdict, j.n.o.v., and new trial).

140. *Id.* at 253 (citations omitted).

141. *Id.* Some cases add that the test means whether reasonable jurors could, under any theory submitted to them, have resolved the dispute as they did.

142. 411 F.2d 365 (5th Cir. 1969)(en banc). The decision affirmed the trial court's denial of directed verdict and j.n.o.v.

143. *Id.* at 370-73. *Planters Mfg. Co. v. Protection Mut. Ins. Co.*, 480 F.2d 869, 874 (5th Cir.), *cert. denied*, 389 U.S. 930 (1967), specifically overruled by *Boeing*, had

[T]he Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of the motions [for d.v. or j.n.o.v.] is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury.¹⁴⁴

The court summed up, “[t]here must be a conflict in substantial evidence to create a jury question.”¹⁴⁵

In determining the sufficiency of the evidence on the entire record, the trial court considers the record intact and must take the record as presented to the jury.¹⁴⁶ The court may not grant a directed verdict of j.n.o.v. by ignoring admitted evidence and then gauging the jury's performance under the fiction that the erroneous evidence was not before it, or by entering judgment on a record altered by the elimination of incompetent evidence.¹⁴⁷

c. The F.E.L.A. and Jones Act Cases

Although the *Boeing* standard of considering all evidence applies

held that the Supreme Court's F.E.L.A. standard applied generally. *See infra* note 148. *See also Helene Curtis*, 385 F.2d at 850-51 (weighing all the evidence is a “trap”).

144. *Boeing*, 411 F.2d at 374 (footnote omitted). This means that the appeal “should not be decided by which side has the better of the case” or by the “complete absence” standard. *Id.* at 374-75.

The *Boeing* sufficiency test, though federal and arguably substantive, is to be applied in diversity cases. *Id.* at 368 (noting split in circuits).

145. *Id.* at 375. Constitutional and institutional arguments in favor of the rejected “some evidence” test may be found in *Planters* and Judge Rives' dissent in *Boeing*.

146. *Midcontinent Broadcast Co. v. North Central Air, Inc.*, 471 F.2d 357, 358 (8th Cir. 1973), *cited in* *Sumitomo Bank of California v. Product Promotions*, 717 F.2d 215, 218 (5th Cir. 1983).

147. *See Sumitomo Bank*, 717 F.2d at 218. This methodology may, however, be acceptable when applied to a new trial motion. *See id.* (citing *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940)). *See also infra* note 343 and accompanying text.

to most claims, the old "complete-absence" rule is still used to review Federal Employees Liability Act¹⁴⁸ and Jones Act¹⁴⁹ verdicts. Less evidence is necessary to support a finding in such cases, it is explained, since a less demanding proof-of-causation standard, requiring only "slight negligence," is applied.¹⁵⁰ Findings on an unseaworthiness claim, on the other hand, are reviewed under the *Boeing* standard.¹⁵¹

In Jones Act cases, the stricter review standard imported from F.E.L.A. cases is usually applied where the defendant employer has asked for a directed verdict.¹⁵² It is uncertain, however, whether the underlying policies equally support the strict test where the *seaman* has moved for a directed verdict, and the "reasonable man" litmus may provide the appropriate standard for reviewing evidence sufficiency in the latter case.¹⁵³ The court has noted this reciprocity problem but normally has found it unnecessary to resolve this conflict and policy dilemma.¹⁵⁴

d. Applications Since *Boeing*: Inferences and Credibility

Many cases cite both *Boeing* and *Liberty Mutual* in setting forth the proper test. Apparently *Boeing* does not supersede the guiding language in *Liberty Mutual*, so long as the latter's general rules are read in light of the appellate discretion allowed in *Boeing*.¹⁵⁵ It is clear in

148. *Lavender v. Kurn*, 327 F.2d 645 (1946). See *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949); *Allen v. Seacoast Prods., Inc.*, 623 F.2d 355, 359-60 (5th Cir. 1980); *Boeing*, 411 F.2d at 370.

149. *Allen*, 623 F.2d at 359-60. See *Ferguson v. Moore-McCormick Lines, Inc.*, 352 U.S. 521, 523 (1957); *Gaspard v. Taylor Diving & Salvage Co.*, 649 F.2d 372 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

150. See *Comeaux v. T.L. James & Co.*, 702 F.2d 1023 (5th Cir. 1983)(on rehearing).

151. *Id.* at 1025-26 (noting the difficulty of mixing Jones Act and unseaworthiness claims). See *Allen*, 623 F.2d at 359-60.

152. See *Allen*, 623 F.2d at 360. But see *Campbell v. Seacoast Prods., Inc.*, 581 F.2d 98, 99 (5th Cir. 1978).

153. See, e.g., *Robin v. Wilson Bros. Drilling*, 719 F.2d 96, 98 (5th Cir. 1983). But the court has consistently used the F.E.L.A. test when reviewing the evidence supporting a finding of the seaman's contributory negligence. See *id.* at 98 n.2.

154. See, e.g., *id.* at 98 & n.2; *Allen*, 623 F.2d at 360.

155. Cases also cite similar general language in *Blount Brothers Corp. v. Reliance Ins. Co.*, 370 F.2d 733 (5th Cir.)(trial court erred in directing verdict), *cert. denied*, 387 U.S. 907 (1967), though that case allowed no appellate reweighing of the entire record. See *id.* at 739.

For application of the sufficiency test in combination with burden of proof and

application, however, that the *Boeing* rule is firmly accepted in the circuit.¹⁵⁶ In applying the *Boeing* standard, some courts have indicated that the type of evidence pointing to the questioned conclusion may be considered in determining whether the evidence is "substantial." "Unsupported, self-serving testimony is not substantial evidence sufficient to create a jury question."¹⁵⁷

This application must be read in light of *Boeing's* caution that "it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses."¹⁵⁸ The jury's authority has been interpreted to mean that inferences and ultimate facts are for the jury, subject to reversal if the evidence is insufficient to sustain the resulting findings.¹⁵⁹ Nevertheless, "[i]t is, of course, axiomatic that inferences . . . cannot stand in the face of uncontradicted and substantial evidence to the contrary."¹⁶⁰

e. Law and Fact

In the sufficiency situation, as in a bench trial, facts are submitted to the fact-finder, but law is freely reviewed.¹⁶¹ Inferences a jury draws are reviewed within the standard sufficiency test and not judged under a separate set of review rules. More basically, the law between "law"

persuasion issues, see *Grey v. First Nat'l Bank in Dallas*, 393 F.2d 371, 380 (5th Cir.), cert. denied, 393 U.S. 961 (1968). For example, the party with the burden of persuasion may have to show "overwhelming" evidence to overturn a verdict against her. See *Allen*, 623 F.2d 355, 360 n.9 (5th Cir. 1980). Nevertheless, this standard may be said to be an application of, rather than an exception to, the usual *Boeing* test.

156. See e.g., *McCullough v. Beech Aircraft Corp.*, 587 F.2d 754, 758 (5th Cir. 1979)(some evidence of manual's defect not enough to preclude a directed verdict). See also *Jefcoat v. Singer Housing Co.*, 619 F.2d 539, 543 (5th Cir. 1980)(reversing grant of j.n.o.v.).

157. *Comfort Trane Air Conditioning v. Trane Co.*, 592 F.2d 1373, 1383 (5th Cir. 1979)(citation omitted). But "[a] verdict based on irrelevant evidence cannot stand." *Crossland v. Canteen Corp.*, 711 F.2d 714, 728 (5th Cir. 1983).

158. *Boeing*, 411 F.2d at 375. Accord *Liberty Mutual*, 386 F.2d at 253.

159. See *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1124 & n.6 (5th Cir. 1978)(discussed in summary judgment context, citing *Boeing* and *Liberty Mutual*).

160. *Scott Medical Supply Co. v. Bedsole Surgical Supplies, Inc.*, 488 F.2d 934, 937 (5th Cir. 1974)(citation omitted). See also *Comfort Trane*, 592 F.2d at 1382-83. These cases do not suggest that they are in conflict with the leeway *Boeing* gives to the jury to judge credibility and inferences.

161. See *supra* note 77. See generally *supra* notes 77-132 and accompanying text. See also *infra* notes 286-305 and accompanying text (summary judgment).

and "fact" is of a different character than that found in the Rule 52(a) context. When a judge's finding is reviewed, initial characterization of the finding as one of fact or law is in essence mere shorthand for the general standards-of-review inquiry: Does the clear error rule apply? When the proper standard is chosen, the case must still be analyzed—through the standard-of-review prism—and the evaluative decision follows.

In the jury situation, on the other hand, "law or fact?" is the decision and not really a standard-of-review set-up. Procedurally, review deals with the relation between judge and jury: Did the judge properly take the issue away from the jury? The answer to this question is substantive, since the judge has committed legal error if he or she was wrong in not submitting it.¹⁶² In determining whether the judge so erred, the substantive law, rather than general standards-of-review language, controls. Thus, unlike in the usual standard-of-review situation, "law or fact?" is more a substantive inquiry, and no follow-up application is necessary. Whether the court legally erred in taking an issue from the jury is often phrased in evidentiary terms: Does the evidence establish a certain issue "as a matter of law"? And that question is in turn answered by reference to the substantive law and the facts of the case *sub judice*.¹⁶³

162. The judge may, of course, be challenged for wrongly deciding to submit an issue to a jury, though some courts seem less willing to consider it reversible error. *See* *Control Components, Inc. v. Valtek, Inc.*, 609 F.2d 763, 770 (5th Cir.), *cert. denied*, 449 U.S. 1022 (1980). *See also* *Continental Conveyor & Equipment Co. v. Prather Sheet Metal Works, Inc.*, 709 F.2d 403 (5th Cir. 1983) (although patent construction normally a legal question, court properly allowed jury to consider claim's meaning in judging infringement); *Tights, Inc. v. Acme-McCrary Corp.*, 541 F.2d 1047, 1060 (4th Cir.) ("if an issue presents a mixed question of fact and law, it may be submitted if the jury is instructed as to the legal standard to be applied"), *cert. denied*, 429 U.S. 980 (1976). *Cf.* *Baumstimler v. Rankin*, 677 F.2d 1061 (5th Cir. 1982) (criticizing the court for directly submitting validity issue to jury).

163. *See Continental Conveyor*, 709 F.2d at 405 (distinguishing Rule 52 review of a bench trial from submission-to-jury issue); *United States ex rel. Weyerhaeuser Co. v. Bucon Constr. Co.*, 430 F.2d 420, 423 (5th Cir. 1970) (directed verdict review is "a pure question of law"). The fact-law dilemma thus may appear in two forms in jury situations. First, is the issue properly one of fact which the jury should have considered? Second, are fact-findings incorrect as a matter of law? The inquiry depends on the substantive law and facts, as framed by the directed verdict or j.n.o.v. context, and the various law/fact characterizations established in the substantive law are beyond the scope of a standards-of-review article.

Some cases indicate that the classifications made under Rule 52 may be used in the parallel inquiry under j.n.o.v. review. *E.g., Castillo*, 704 F.2d 181 (5th Cir. 1983)

2. Fact Findings and Damages

a. Findings by Jury

The *Boeing* standard also applies to specific jury findings, such as those made on written interrogatories under Rule 59.¹⁶⁴ One court, for example, applied both *Boeing* and *Liberty Mutual* in upholding jury findings of fair market value.¹⁶⁵

b. Special Verdicts: Inconsistencies

The court may, under Rule 49(a), submit the case to the jury in the form of specific fact questions accompanied by appropriate legal instructions. A fact issue not submitted is, absent request or objection, considered submitted to the judge.¹⁶⁶ The jury's written findings are protected by constitutional and procedural guidons. Where the findings are apparently inconsistent, "[t]he Seventh Amendment requires that if there is a view of the case which makes the jury's answers consistent, the [trial] court must adopt that view and enter judgment accordingly."¹⁶⁷

(court erred in submitting FLSA employee status to jury since status is a legal question and was established as a matter of law). *Castillo* adds the broad and very arguable statement that the "plaintiff's decision to exercise his right to a jury trial does not change the standard of review to be applied by this court." *Id.* at 187 (footnote omitted). In context, however, the court was not applying a standard of review but instead adopted the Rule 52 standard in deciding the purely legal and substantive issue presented in that case. *See Continental Conveyor*, 709 F.2d at 405-06. Judge Higginbotham expressed some seventh amendment concern with the *Castillo* analysis. *See supra* text accompanying note 126.

164. FED. R. CIV. P. 49(a) governs special verdicts; Rule 49(b) allows the general verdict with interrogatories.

165. *Sammons v. United States*, 433 F.2d 728 (5th Cir. 1970), *cert. denied*, 402 U.S. 945 (1971). *See also Liberty Mutual*, 386 F.2d at 253.

166. *See* FED. R. CIV. P. 49(a); *Perricone v. Kansas City Southern Ry. Co.*, 704 F.2d 1376, 1380 (5th Cir. 1983).

167. *Griffin v. Matherne*, 471 F.2d 911, 915 (5th Cir. 1973). The test the trial court uses to reconcile ostensible conflicts "is whether the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted." *Id.*

The Fourth Circuit has found reversible error in a district judge's decision to return the case to the jury although the first answers given were not legally inconsistent. *See McCollum v. Stahl*, 579 F.2d 869 (4th Cir. 1978), *cert. denied*, 440 U.S. 912 (1979).

c. Damages

Whether evidence supports a jury's assessment of damages—as well as the figure chosen—should also be reviewed by a test of reasonableness. The upper limit has been defined as the “maximum which the jury could reasonably find.”¹⁶⁸ Other guiding phrases abound and either coexist with or interpret a reasonableness test. A recent case stated that the appeals court “will not reverse the jury's verdict unless the award is so large that it shows passion or prejudice or shocks the judicial conscience.”¹⁶⁹ Especially where subjective evaluations are made, the award must be “grossly excessive.”¹⁷⁰

A damages award may be challenged as erroneous as a matter of law (for example, the award was based on faulty legal apportionment principles, or on damages legally unavailable).¹⁷¹ But the damages challenge usually arises in the context of reviewing the trial judge's initial discretionary response to the jury's finding. The cases have not, however, clearly separated the legal sufficiency question from this new trial (or conditional new trial) situation.¹⁷²

However the test is framed, it is apparent that the jury's choice in practice is given real deference. “[E]xamination of the Fifth Circuit cases in this field reveals only rare instances in which the court felt

168. See *Bonura v. Sea Land Serv.*, 512 F.2d 671, 672 (5th Cir. 1974) (Goldberg, J., dissenting from denial of rehearing en banc). Accord *Bonura v. Sea Land Serv.*, 505 F.2d 665, 669 (5th Cir. 1974). Cf. *Perricone v. Kansas City Southern Ry. Co.*, 704 F.2d 1376, 1382 (5th Cir. 1983) (“when approved by the trial judge, such awards will be overturned only when contrary to right reason or for a clear abuse of discretion.”). See generally *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975).

169. See *Pope v. Rollins Protective Servs. Co.*, 703 F.2d 197, 207 (5th Cir. 1983).

170. See *id.* at 206-07 (judge did not abuse discretion since the verdict was not gross excess). *Pope* adds that the verdict is taken as is—before trebling—in determining its excessiveness *vel non*. *Id.*

171. See, e.g., *id.* at 203-04.

172. See generally *infra* notes 331-40 and accompanying text. The cases do not clearly separate the various procedural paths in which the damages issue arises (except perhaps where the court reviews a judge's reduction of the jury award, *infra* note 323) or the precedent and catch phrases called on to set up the appellate determination. Thus, the principles outlined in this section may be found in the new trial context. E.g., *supra* note 170. But they may also inform generally the reasonableness review for excessiveness. Perhaps the Eleventh Circuit could clarify these distinctions, or at least settle on an ungarbled reasonableness test, avoiding the proliferation of further definition and the bleeding of theoretically different review situations.

bound to set aside a jury award for its excessiveness."¹⁷³ A point of departure from this general observation may occur when the trial judge has, within his discretion, reduced an award.¹⁷⁴ The appeals court, despite seventh amendment concerns, has given the judge leeway, finding abuse "only when it appears that the jury's original verdict was *clearly within* the universe of possible awards which are supported by the evidence."¹⁷⁵ But the jury's award, at any rate, "is not to be disturbed unless it is entirely disproportionate to the injury sustained."¹⁷⁶

3. Directed Verdict and J.N.O.V.

a. Rule 50 and Review Principles

Rule 50 sets forth the procedural rules governing motions for directed verdicts and judgment *non obstante veredicto*.¹⁷⁷ Although the rule does not on its face require the judge, as does Rule 52, to make findings, the motion must state its grounds,¹⁷⁸ and the court must, in making the conditional decision on new trial included in Rule 50, specify the decisional reasons.¹⁷⁹ The trial court uses the same standard in passing on a motion for directed verdict or j.n.o.v. as does the appellate court in reviewing the judge's decision on the motion.¹⁸⁰ This standard

173. *Perricone*, 630 F.2d at 319 (reversing damages).

174. *See infra* note 340 and accompanying text.

175. *Bonura*, 505 F.2d at 670 (emphasis in original).

176. *Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778, 784 (5th Cir. 1983).

177. FED. R. CIV. P. 50(a)(d.v.) and 50(b)(j.n.o.v.).

178. FED. R. CIV. P. 50(a). *See generally* *O'Brien v. Westinghouse Elec. Co.*, 293 F.2d 1, 5-10 (3d Cir. 1961). This requirement, settling an early conflict in the cases, may in practice inform the appellate court, even where a judge does not spell out his or her grounds in an opinion or judgment.

179. FED. R. CIV. P. 50(c).

180. *E.g.*, *Sulmeyer v. Coca-Cola Co.*, 515 F.2d 835 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). *See* *Hayes v. Solomon*, 597 F.2d 958, 972 (5th Cir. 1979). The same standard applies whether the motion is for directed verdict or j.n.o.v., and whether the judge grants or denies the motion. *See, e.g.*, *United States ex rel. Weyerhaeuser Co. v. Bucon Const. Co.*, 430 F.2d 420, 423 (5th Cir. 1970). It may be argued that application of the directed verdict test may be slightly different when defendant brings the motion at the close of all evidence rather than plaintiff's case, since the moving party once the evidence is in, having the burden of proof, should show that her opponent's proof is insufficient as a matter of law and that her own evidence suffices and cannot be discarded by the jury. *See generally* *Grey v. First Nat'l Bank in Dallas*, 393 F.2d 371, 380 (5th Cir.) (discussing sufficiency and burden of proof), *cert. denied*, 393 U.S. 961 (1968).

is, of course, the general test for sufficiency of a jury's verdict and findings outlined in *Boeing Company v. Shipman*.¹⁸¹

b. Directed Verdict as Prerequisite

A motion for j.n.o.v. cannot be made unless an earlier proper directed verdict motion was made (and renewed, if necessary). The earlier motion "is a prerequisite, virtually jurisdictional."¹⁸² Although this rule is followed strictly, the courts at times will stretch the notion of what constitutes a motion under the rule.¹⁸³ Occasionally the trial court will grant j.n.o.v. even though no directed verdict motion has been made. In such a situation the Fifth Circuit has recently indicated it will review the case as where the sufficiency is challenged on appeal after no j.n.o.v. motion at all had been filed, *i.e.*, asking whether "any" evidence supports, or plain error taints, the jury's finding.¹⁸⁴ The Eleventh Circuit, applying former Fifth authority, may follow suit.

c. Review After No Motion: "Plain Error"

Failure to move for directed verdict, or to renew the motion by moving for j.n.o.v., is said to preclude review of a jury verdict. "It is well settled that in the absence of a motion . . . made at trial this Court cannot examine the evidence for sufficiency."¹⁸⁵ Nevertheless, the language of "plain error" has slipped into the case law.¹⁸⁶ Thus,

181. See generally *supra* notes 142-80 and accompanying text. The trial court must consider the record as presented to the jury. See *supra* notes 146-47 and accompanying text. See *infra* notes 324-325 for comparison of these motions with the new trial on appeal.

182. *Perricone v. Kansas City Southern Ry. Co.*, 704 F.2d 1376, 1380 (5th Cir. 1983). See *FED. R. Civ. P.* 52(b); *Rawls v. Daughters of Charity*, 491 F.2d 141 (5th Cir.), *cert. denied*, 419 U.S. 1032 (1974).

183. See, e.g., *Roberts v. Price*, 398 F.2d 954 (5th Cir. 1968). See also *FED. R. Civ. P.* 46 (general rule that formal exceptions are unnecessary).

184. See *Perricone*, 704 F.2d at 1380.

185. *Delchamps, Inc. v. Borkin*, 429 F.2d 417, 418 (5th Cir. 1970). See *Dunn v. Sears, Roebuck & Co.*, 639 F.2d 1171, 1175 (5th Cir.), *modified on other grounds*, 645 F.2d 511 (5th Cir. 1981); *Vergott v. Deseret Pharmaceutical Co., Inc.* 463 F.2d 12,15 (5th Cir. 1972) ("short answer" is that no motion for a directed verdict equals no review for sufficiency). The cases are sometimes lenient in defining a sufficient motion under this rule. See *Coughlin v. Capitol Cement Co.*, 571 F.2d 290 (5th Cir. 1978) (considering partial preservation by new trial motion). See also *Quinn v. Southwest Wood Products, Inc.*, 597 F.2d 1018, 1025-26 (5th Cir. 1979).

186. See, e.g., *Dunn*, 639 F.2d at 1175; *Urti v. Transport Comm'l Corp.*, 479

although "we may not question the sufficiency of whatever evidence we do find," the court may reverse if "plain error has been committed which, if not noticed, would result in a manifest miscarriage of justice."¹⁸⁷

Applications of the plain error exception is an inquiry standing in contrast to the normal *Boeing* standard: the court affirms if there is "any evidence supporting the jury's finding."¹⁸⁸ One court, for example, reversed on a determination of "no evidence" in reviewing a directed verdict motion not renewed by j.n.o.v. motion.¹⁸⁹

C. Trial Judge: Supervision and Discretion

1. Evidence and Trial

a. Evidentiary Rulings: "Abuse of Discretion"?

Evidentiary matters are said to be committed to the "discretion" of the trial court. On appeal in the various circuits this means that evidentiary calls, in general, are reviewed only for "abuse of discretion." As one recent court observed, sounding almost tired: "Time and again we have stated that the admission of evidence is within the sound discretion of the district court. Absent proof of abuse an appellate court will not disturb a district court's evidentiary rulings."¹⁹⁰

F.2d 766, 769 (5th Cir. 1973). *See generally Coughlin*, 571 F.2d at 297.

187. *Little v. Bankers Life & Cas. Co.*, 426 F.2d 509, 511 (5th Cir. 1970).

188. *Id.* (emphasis in original). *See also Hall v. Crown Zellerbach Corp.*, 715 F.2d 983, 986-87 (5th Cir. 1983). The cases are not always clear whether the "any evidence" rule is the application of a "plain error" exception, or "plain error" is an alternative ground for relief, even where some evidence exists. But the cases do not indicate a conflict in interpretation, much less an outcome-determinative one, possibly because the rule echoes the pre-*Boeing* "scintilla" test.

189. *Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033 (5th Cir. 1970), *cert. denied*, 407 U.S. 921 (1972).

190. *Jon-T Chems., Inc. v. Freeport Chem. Co.*, 704 F.2d 1412, 1417 (5th Cir. 1983)(citations omitted). *See Noel Shows, Inc. v. United States*, 721 F.2d 327 (11th Cir. 1983). *See also infra* note 197 and accompanying text (applicability of evidence rules in bench trials). Sometimes the test for evidence is phrased as "clear abuse" or "manifest error." *See Perkins v. Volkswagen of America, Inc.*, 596 F.2d 681, 682 (5th Cir. 1979). One case stated that rulings must be affirmed unless they affect a substantial right of the complaining party, though the language is probably an application of harmless error doctrine rather than evidentiary scope of review. *See Whitehurst v. Wright*, 592 F.2d 834, 840 (5th Cir. 1979); *FED. R. EVID.* 103(a). *See also infra* note 197. The cases do not, at any rate, appear in practice to distinguish "abuse" from

The cases do not go on to define such "abuse" though obviously substantial deference is involved. As Professor Rosenberg observes, discretion is a pervasive yet elusive concept.¹⁹¹ The standard is, at any rate, broadly applied in many evidence situations.¹⁹² The notion of "discretion" in reality has two dimensions: the broad manner with which a judge can deal with the matter below, and the limited review afforded such decisions.¹⁹³ Many evidentiary rulings involve both sides of this coin, so that tethered review follows from situations where the trial judge was in the position to exercise discretion. Many cases set out the standard-of-review in this format, first noting that the judge has discretion, then adding that review is thus limited.

In the evidentiary context, however, the "abuse" test is often used even where the judge has not specifically used true discretion. Although the "abuse of discretion" standard is, on its face, the appropriate test by which to review a judge's application of an evidence rule to trial facts, it does not necessarily follow that *all* evidence rulings should be given "abuse" deference, especially where the challenged ruling is simply the legal analysis of the *applicability* or construction of a given rule. The latter decisions are, analytically, conclusions of law rather than exercises of discretion. Nevertheless, many cases state the "abuse" test as one of general review of evidentiary calls.¹⁹⁴ Conversely, many

"clear abuse," though the latter might be said to apply to those rulings which necessarily involve true discretion at trial. See *infra* notes 193, 261 and accompanying text.

In criminal cases, too, determinations on admissibility are said to reside generally within the district court's discretion. *E.g.*, *United States v. Cohen*, 544 F.2d 781, 786 (5th Cir.), *cert. denied*, 431 U.S. 914 (1977); *United States v. Linetsky*, 533 F.2d 192, 204 (5th Cir. 1976). More generally, the criminal area is usually not presented as having a separate set of evidence rules. *Cf.* *Chambers v. Mississippi*, 410 U.S. 284 (1973); *infra* note 199. Administrative law, on the other hand, may in practice follow its own star. See E. CLEARY, MCCORMICK ON EVIDENCE § 348, at 997-1000 (3d ed. 1984) [hereinafter cited as MCCORMICK ON EVIDENCE]. However, in some contexts the agency must follow the federal rules. *E.g.*, *NLRB v. Gulf States United Tel. Co.*, 694 F.2d 92 (5th Cir. 1982)(Board bound "so far as practicable" by regulation).

191. Rosenberg, *supra* note 13. "What are the standards or factors that lead to a finding that there has been an abuse of discretion? The decided cases are not especially informative." *Id.* at 180.

192. See, *e.g.*, *Ramos v. Liberty Mut. Ins. Co.*, 615 F.2d 334, 340 (5th Cir. 1980); *King v. Ford Motor Co.*, 597 F.2d 436 (5th Cir. 1979); *Gaspard v. Diamond M Drilling Co.*, 593 F.2d 605 (5th Cir. 1979); *Bailey v. Kawasaki-Kisen, K.K.*, 455 F.2d 392 (5th Cir. 1972).

193. See Rosenberg, *supra* note 13, at 175.

194. *E.g.*, *Jon-T Chems.*, 704 F.2d at 1417. This approach may be used because of the difficulty, in close cases, of determining where discretion ends and legal analysis

cases do not rely on the "abuse" test or refer to the judge's discretion, but—apparently following the principle that errors of law are freely corrected—simply decide whether or not the evidence was admissible; if not, and prejudice resulted, the reviewing court will reverse.¹⁹⁵

Applicability of the "abuse" standard is especially clear—and perhaps deference is stronger—where the evidentiary ruling is based on a rule explicitly giving discretion to the court or where an evidentiary call is intimately bound with the trial facts. A prejudice determination under Federal Rule of Evidence 403, for example, necessarily involves true discretion. "This is a question of legal relevance, a matter on which the trial judge has wide discretion, and which the appellate court will not reverse unless the trial judge has clearly abused his discretion."¹⁹⁶ Nevertheless, the courts do not state that the "abuse" standard should be limited to such situations.

Whether an evidentiary call is challenged as abuse or simple error, the appellate court must, under Federal Rule of Evidence 103(a), further inquire whether "a substantial right of the party is affected," since nonprejudicial, "harmless" errors are not reversed.¹⁹⁷ On the other

begins, though the cases do not reveal a conscious choice.

195. See, e.g., *Central Freight Lines, Inc. v. NLRB*, 653 F.2d 1023, 1026 (5th Cir. 1981) ("matter of law" that hearsay admitted erroneously); *Reyes v. Missouri Pac. R. Co.*, 589 F.2d 791, 794-95 (5th Cir. 1979). See generally 10 J. MOORE & J. LUCAS, *supra* note 25, §§ 609.13, 609.14. It may be, of course, that no practical difference results, since erroneously admitted evidence is likely to constitute an abuse. Nevertheless, traditionally a lax abuse standard defines how hard the appeals court looks for error, and in the final analysis, legal error may be more easily excused under review only for abuse.

196. *Wright v. Hartford Accident & Indem. Co.*, 580 F.2d 809, 810 (5th Cir. 1978). See *Consolidated Grain & Barge Co. v. Marcona Conveyor Corp.*, 716 F.2d 1077, 1082 (5th Cir. 1983). But the discretion is not unbounded; further, a distinction may be made for the appellate court in deciding whether Rule 403 is legally applicable or the legal requirements of any such application. See *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc) (Rule 404(b)), *cert. denied*, 440 U.S. 920 (1979); *Bailey*, 455 F.2d at 392 (Rule 407).

197. FED. R. EVID. 103(a) provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected" and the error is properly preserved. Any such harmless error must be distinguished from the same-named analysis used to review constitutional error. See generally R. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* (1970). Cf. *Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454, 1457-59 (9th Cir. 1983) (distinction drawn on criminal/civil lines more appropriate than "constitutional"/"nonconstitutional" dichotomy); *infra* notes 367-68 and accompanying text.

Although the evidence rules apply to trial by jury or judge, their application may

hand, alleged errors not properly preserved by timely objection or offer of proof¹⁹⁸ may be tested for "plain error" under Rule 103(d).¹⁹⁹

A safe summary, then, concludes that "abuse of discretion" is the general standard to be applied on review of most evidentiary decisions, except perhaps those evidence rules which do not appear to commit to the trial court's discretion.²⁰⁰ Next, reference to a case which applies the test to the specific rule in question would be helpful, as would the facts *sub judice* which might establish such abuse.²⁰¹ Finally, the reviewing court must examine an otherwise reversible decision for "prejudice to a substantial right of the party contesting the admission, coupled with timely objection."²⁰²

Although the cases do not clearly distinguish between evidence rulings which are generally affirmed absent abuse and those situations

be relaxed somewhat in a bench trial. This view is said to have its strongest impact where appellate courts review for prejudice. *See* MCCORMICK ON EVIDENCE, *supra* note 190, § 60, at 153-54. *See also* C. WRIGHT, FEDERAL COURTS § 96, at 645 (4th ed. 1983); *Builders Steel Co. v. Commissioner*, 179 F.2d 377, 379 (8th Cir. 1950).

198. FED. R. EVID. 103(a)(1)(specific objection requirement to party attacking admission) and 103(a)(2)(offer of proof where exclusion is challenged). *Cf.* FED. R. CIV. P. 32(d)(3).

199. FED. R. EVID. 103(d) provides: "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court." *See* *United States v. Garcia*, 530 F.2d 650 (5th Cir. 1976). The Advisory Committee's Notes observe that in practice plain error is more likely to arise where evidence is admitted than excluded.

Since Rule 103(d) neither proscribes nor prescribes "plain error" review, resort to the case law is necessary to establish such a rule in the circuit. Although the exception is often applied in criminal cases, such as *United States v. Abravaya*, 616 F.2d 250, 251-52 (5th Cir. 1980), and is patterned after FED. R. CRIM. P. 52(d), it is less clear how—and how much—the rule will be applied in civil actions. MCCORMICK ON EVIDENCE states that the plain error rule is "much less common in civil cases than in criminal cases, perhaps in part because liberty and life are not involved as a motive to apply the doctrine. . . ." MCCORMICK ON EVIDENCE, *supra* note 190, § 52, at 134 (footnote omitted), though the Notes of the Advisory Committee are to the contrary. *See generally* Wangerin, "Plain Error" and "Fundamental Fairness," 29 DE PAUL L. REV. 753 (1980).

200. *See* FED. R. EVID. 609(a)(language of "shall") and 803(24) (discretionary federal hearsay exception, implying that other exceptions are not discretionary).

201. The appellate lawyer might, of course, wish to argue (and find cases to support) that a certain evidentiary call is in effect a question of law, for example, how "regular practice" in the business records rule, FED. R. EVID. 803(6), should be interpreted. *See* *United States v. Robinson*, 700 F.2d 705, 210 (5th Cir. 1983).

202. Rubin, *The Admiralty Case on Appeal in the Fifth Circuit*, 43 LA. L. REV. 869, 873 (1983)(footnotes omitted).

where it is more appropriate, at least tacitly, to review admissibility *vel non* as a matter of law, it might be argued that a distinction should be drawn where the ruling "is based on facts or circumstances that are critical to decision and that the record imperfectly conveys."²⁰³ The line might be called true discretion. The circuit may, of course, find the line undesirable and prefer an "either/or" course where, as presently, it appears that an unspoken line is drawn from intuition or appellate facts. Nevertheless, "[t]o tame the concept [of discretion] requires no less than to force ourselves to say *why* it is accorded or withheld, and to say so in a manner that provides assurance for today's case and some guidance for tomorrow's."²⁰⁴

b. Comment on the Evidence

Despite the traditional concept of the judge as a passive umpire, the modern trial judge has maintained the common-law power of summary and assessment of the evidence. This authority is, of course, subject to the limitations forced by the jury's function and the requirement of impartiality.²⁰⁵ Judge's comments which have the effect of preventing the jury from resolving an issue of fact are error unless the court could have directed a verdict on that issue.²⁰⁶

c. Supervision of Trial

Most of the district court's decisions by which the trial is supervised and conducted, including timing, control, and oversight of arguments, are said to be within the court's discretion.²⁰⁷ Affirmance is

203. Rosenberg, *supra* note 13, at 183 (emphasis omitted).

204. *Id.* at 185 (emphasis in original).

205. See *Quercia v. United States*, 289 U.S. 466, 470 (1933). The judge may not, for example, state which view of conflicting evidence is more credible. Many states do not permit the practice of commenting on the evidence. See C. WRIGHT, *supra* note 197, § 94, at 629. See also *id.* § 97, at 651.

206. *McCullough v. Beech Aircraft Corp.*, 587 F.2d 754, 760-62 (5th Cir. 1979); *International Paper Co. v. United States*, 227 F.2d 201, 205 (5th Cir. 1955). See generally 1 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 107[07] (1981). For review of such comment after faulty objection, see *Vergott v. Deseret Pharmaceutical Co., Inc.*, 463 F.2d 12 (5th Cir. 1972).

207. See generally *Herring v. New York*, 422 U.S. 853, 862 (1975) ("broad supervisory discretion"). For review of jury argument which was not objected to, see *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 286 (5th Cir. 1975). Of course the circuit may impose requirements on how the discretion is exercised, as by requiring on-

mandate absent abuse. The standard is broadly applied, for example, to sequestration of witnesses,²⁰⁸ qualifying experts,²⁰⁹ application of the pretrial order,²¹⁰ and even the use of offensive collateral estoppel.²¹¹ Also discretionary are dispositions on motions for mistrial²¹² and intervention,²¹³ as well as *voir dire* matters.²¹⁴ Because of the realities of the trial situation, the judge's supervisory power is often, in practice, inevitably broad. As one appellate judge has observed:

The trial judge is a potent figure indeed. . . . He can communicate his attitude in a thousand ways from a cocked eyebrow to a sideways glance. Those will not be of record. They are not reviewable. Trial judges are disciplined ultimately only by their good faith and integrity and by an occasional reminder from their appellate brethren to be constantly vigilant of their power.²¹⁵

the-record determinations or other factors the trial court "must" consider.

208. *McKee v. McDonnell Douglas Technical Servs. Co., Inc.*, 700 F.2d 260, 262 (5th Cir. 1983).

209. *Ludlow Corp. v. Textile Rubber & Chem. Co.*, 636 F.2d 1057 (5th Cir. 1981).

210. *Emmons v. Southern Pac. Transp. Co.*, 701 F.2d 1112 (5th Cir. 1983)(citing *Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980)). The *Emmons* court noted that if "the parties actually litigate without objection issues not raised in the order, there is little reason to enforce pretrial elimination of the issues." *Id.* at 1118 (quoting *Perfection-Cobey Co. v. City Tank Corp.*, 597 F.2d 419, 420 (4th Cir. 1979)). See also *Flannery v. Carroll*, 676 F.2d 126 (5th Cir. 1982). But introduction of evidence on an issue already in the case does not necessarily show consent to trying a new issue. See *International Harvester Credit Corp. v. East Coast Truck*, 547 F.2d 888, 890 (5th Cir. 1977). In something of a twist of analysis, *Emmons* states that it is not abuse to admit evidence not in the pretrial order where the opposing party does not object. 701 F.2d at 1118-19.

211. *Brumley Estate v. Iowa Beef Processors, Inc.*, 704 F.2d 1351, 1355 (5th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 1288 (1984). The doctrine's conditions are set out in *Rufenacht v. Iowa Beef Processors, Inc.*, 656 F.2d 198, 202 (5th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982).

212. See *Nevels v. Ford Motor Co.*, 439 F.2d 251, 258 (5th Cir. 1971)(mistrial on basis of improper argument).

213. See *Lelsz v. Kavanagh*, 710 F.2d 1040, 1043 (5th Cir. 1983)(denial under Rule 24(a)(2) reversed as abuse).

214. *Stokes v. Delcambre*, 710 F.2d 1120, 1128 (5th Cir. 1983)("wide discretion").

215. *Perricone*, 704 F.2d at 1378-79. Professor Wright once noted that the "federal judge is a very puissant figure," and adds that "it is wise to leave many details of procedure to the informed discretion of the judge." C. WRIGHT, *supra* note 197, § 97, at 651-52. See also *infra* text accompanying note 315.

Nevertheless, the court does not hesitate to reverse if the requisite abuse is found.²¹⁶

d. General Supervision and Discretion

District judges are more than just trial judges; their function involves supervision of litigation in the broader sense and other duties of control and direction over the docket, the district, and parties before the court. The broad rule of district judges, like the judgments of immediate trial control, are often considered discretionary.

i. Supervisory Applications

The Eleventh Circuit has applied the "abuse of discretion" test to a wide assortment of supervisory situations, including transfer of an action²¹⁷ and determination of "excusable neglect" for untimely appellate filings.²¹⁸ The test is also applied to the court's decision on class certification,²¹⁹ as well as its approval of a proposed class settlement²²⁰ or consent decree.²²¹ The severance of trials under Rule 42(b) is re-

216. See *United States v. Welliver*, 601 F.2d 203, 208 n.12 (5th Cir. 1979).

217. See *Abshire v. Seacoast Products, Inc.*, 668 F.2d 832 (5th Cir. 1982). When the successor court reconsiders an order or judgment picked up from the transfer, its decision is within its discretion though, for reasons of comity, the court ought not overrule the prior judge. *Id.* See also *Gallimore v. Mo. Pac. RR*, 635 F.2d 1165 (5th Cir. 1981).

218. See *Gann v. Smith*, 443 F.2d 352 (5th Cir. 1971)(broad discretion to apply FED. R. APP. P. 4(a)). See also *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962)(great deference). Cf. *Lewis v. Knutson*, 699 F.2d 230 (5th Cir. 1983)(excusable neglect for incomplete discovery).

219. See *Ezell v. Mobile Housing Bd.*, 709 F.2d 1376 (11th Cir. 1983). See also *Everitt v. City of Marshall*, 703 F.2d 207 (5th Cir. 1983)(denial of certification not an abuse); *Sheffield v. County Bd. of Supervisors*, 439 F.2d 35 (5th Cir. 1971)(motion to dismiss class action). See generally Note, *Federal Appellate Review of the Grant or Denial of Class Action Status*, 18 B.C. IND. & COM. L. REV. 101 (1976) (appealability).

220. *Bennett v. Behring Corp.*, 737 F.2d 982 (11th Cir. 1984). See *Reed v. General Motors Corp.*, 703 F.2d 170 (5th Cir. 1983). *Reed* surveys the cases and lists the factors for reviewing the exercise of discretion in this area. See also *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195 (5th Cir. 1981).

221. See *Williams v. City of New Orleans*, 694 F.2d 987 (5th Cir. 1982)(finding abuse in denial of approval), *rev'd en banc*, 729 F.2d 1554 (5th Cir. 1983); *United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981)(en banc). The panel opinion in *Williams* also notes that the fact-findings on which the judge's decision is based are

viewed for abuse,²²² as is the consolidation of actions²²³ and continuances.²²⁴ Often in a particular area the judge is given discretion, subject to review for abuse, but the cases tack on some additional cautions. Rule 41(b), for example, empowers the court to dismiss an action involuntarily for failure to prosecute or comply. The discretion, however, is to be exercised only in extreme cases.²²⁵ Likewise, although the court has broad discretion in controlling discovery,²²⁶ it must "adhere to the liberal spirit of the Rules,"²²⁷ and "[t]he imposition of unnecessary limitations on discovery is especially frowned upon in Title VII cases."²²⁸

accepted unless clearly erroneous.

222. *United States v. 499.472 Acres of Land*, 701 F.2d 545 (5th Cir. 1983)(noting relevant factors). Professor Wright analyzes the problems and factors where issues are submitted to separate juries. C. WRIGHT, *supra* note 197, § 97, at 651-52. The Fifth Circuit recently expressed similar concern over a bifurcation decision:

While we do not doubt the power of a trial court to order a separate trial on its own motion or, in its discretion, to separately try the damage issues in a case such as this, the present record nevertheless illustrates the unfortunate confusion which can occur when the above-quoted admonition . . . is not fully heeded.

Pryor v. Gulf Oil Corp., 704 F.2d 1364, 1370 (5th Cir. 1983)(citing *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307 (5th Cir. 1976)).

223. *See* 9 C. WRIGHT & A. MILLER, *supra* note 66, §§ 2382-2386 (1971). FED. R. CIV. P. 42(a) permits the judge to order joint trial of separate actions. In both situations discretion is limited too by the requirement that the actions involve a common issue of law or fact. *See* C. WRIGHT, *supra* note 197, § 97, at 652-53. Professor Wright also discusses the factors and tests for a judge's joinder of parties (noting federal discretion), acceptance of voluntary dismissal (broad common law power restricted somewhat by Rule 41(a)), referral to a master (rule discretionary but requires certain circumstances, especially in nonjury cases), and disqualification (must be and seem impartial). *See id.* at 651-55.

224. *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 665 (5th Cir. 1983).

225. *See Mann v. Merrill Lynch*, 488 F.2d 75 (5th Cir. 1973). But involuntary dismissal for inadequate proof is reviewed on legal grounds. *See supra* text accompanying notes 306-10.

226. *Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124, 1133 (5th Cir. 1976).

227. *Burns v. Thiokol Chem. Corp.*, 483 F.2d 300, 304 (5th Cir. 1973). The Federal Rules in general "are to be accorded a broad and liberal treatment." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). *See generally* Note, *Appellate Review of Discovery Orders in the Federal Courts*, 1980 S. ILL. U.L.J. 339 (appealability).

228. *Trevino v. Celanese Corp.*, 701 F.2d 397, 406-07 (5th Cir. 1983)(finding abuse).

ii. Attorneys' Fees and Costs

Much like the review of discovery orders, an award of attorney's fees is within the judge's discretion,²²⁹ but should be awarded in civil rights cases "unless special circumstances would render such an award unjust."²³⁰ Similar rules govern costs under Rule 54(d).²³¹ "[W]hile an award of costs to a prevailing party is usual, the inclusion of various items within that award is within the discretion of the trial judge."²³²

iii. Forum Non Conveniens and Choice of Law

Choice of law determinations are not reviewed under the abuse test,²³³ but are subject to de novo appellate review.²³⁴ Conversely, the appeals court "may reverse a district court's decision on a motion to

229. *Atlantic Richfield Co. v. Manges*, 702 F.2d 85 (5th Cir. 1983)(award affirmed unless abuse). The abuse standard has been applied in diversity cases, and statutory cases, such as 20 U.S.C. § 3205 and 42 U.S.C. § 1988. The factors relevant to a determination are articulated in *Johnson v. Ga. Hwy. Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *But cf. Northcross v. Bd. of Educ. of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Louisville Black Police Officers Org., Inc.*, 700 F.2d 268, 273 (6th Cir. 1983). It is not yet clear whether *Johnson* applies to diversity cases. *See Atlantic Richfield*, 702 F.2d at 87.

230. *Brown v. Miller*, 631 F.2d 413, 414 (5th Cir. 1980)(citing § 1988). *See* 28 U.S.C. § 204(a) (1982). *See also* *Blum v. Stenson*, ___ U.S. ___, 104 S. Ct. 1706 (1984); *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Some statutes, such as the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E)(1982 & Supp.), are more neutral grants of discretion, requiring no special presumption of an award. *See Blue v. Bureau of Prisons*, 570 F.2d 529 (5th Cir. 1978)(listing relevant factors). It appears that diversity cases are similarly neutral on the attorneys' fee issue, depending of course on state law. *See Atlantic Richfield*, 702 F.2d at 87.

231. FED. R. Civ. P. 54(d). *See* 28 U.S.C. § 1920(4)(1982)("may award").

232. *Hodge v. Seiler*, 558 F.2d 284, 287 (5th Cir. 1977). *See Newman v. A.E. Staley Mfg. Co.*, 648 F.2d 330, 336 (5th Cir. 1981)(reversing "vacation of costs will require an abuse of discretion"); *In re Nissan Antitrust Litig.*, 577 F.2d 910, 918 (5th Cir. 1978)("clear abuse"), *cert. denied*, 439 U.S. 1072 (1979). While cost matters are subject to review for abuse, a finding on necessity is considered factual. *See Studiengesellschaft Kohle mbH. v. Eastman Kodak Co.*, 713 F.2d 128 (5th Cir. 1983).

233. *Bailey v. Dolphin Int'l, Inc.*, 697 F.2d 1268, 1274 (5th Cir. 1983). *See also* *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82, 84 (9th Cir. 1980), *cert. denied*, 451 U.S. 920 (1981). *Cf. Loumar, Inc. v. Smith*, 698 F.2d 759 (5th Cir. 1983)(facts underlying finding of no minimum contacts in personal jurisdiction inquiry not clearly erroneous).

234. *Bailey*, 697 F.2d at 1274. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

dismiss based on forum non conveniens only if its action constitutes a clear abuse of discretion."²³⁵

iv. Injunctions and Declaratory Actions

The trial court usually has broad discretion in granting or denying a preliminary injunction, subject to review for abuse.²³⁶ (Stays pending appeal are subject to a similar analysis.)²³⁷ Because the application for relief is in equity, fact findings by which the judge supports his decision are subject to Rule 52(a).²³⁸ Although the abuse standard is generally employed among the circuits, the Second Circuit has developed a line of broad de novo review when the judge's decision rests on documentary evidence.²³⁹

The equity court, even when fashioning more permanent relief, is generally acting in a discretionary capacity, subject of course to the

235. *Constructora Spilimerg, S.A. v. Mitsubishi Aircraft Co.*, 700 F.2d 225, 226 (5th Cir. 1983).

236. *See Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1187 (5th Cir. 1979). The abuse standard has long been applied in such situations. *See United States v. Corrick*, 298 U.S. 435, 437-38 (1936). *See generally Deckert v. Independence Corp.*, 311 U.S. 282, 290 (1940) (orders issued under court's general equitable powers reviewed only for abuse).

The courts, both trial and appellate, consider four factors: likelihood of success on the merits, irreparable injury, no substantial harm to other parties, and the public interest. *E.g.*, *State of Tex. v. Seatrain Int'l*, 518 F.2d 175 (5th Cir. 1975). Findings on these four factors are mixed fact-law questions. *Buchanan v. United States Postal Serv.*, 508 F.2d 259 (5th Cir. 1975). *See also Va. Petroleum Jobbers Ass'n v. F.P.C.*, 259 F.2d 921, 925 (D.C. Cir. 1958) (establishing the now-popular four-part formula). *Cf. Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983) (the Ninth Circuit organizes these factors into a "continuum" analysis).

The district court is required to make findings of fact and law. *Canal Auth. v. Callaway*, 489 F.2d 567 (5th Cir. 1974).

237. *See Lopez*, 713 F.2d at 1435. Although the judge's decision is said to be reviewable only for abuse, courts will grant a stay of an injunction pending appeal only sparingly and regard it as "an extraordinary form of reprieve." *Reed v. Rhodes*, 472 F. Supp. 604, 605 (N.D. Ohio 1979). The stay is a disfavored remedy because it interrupts the ordinary process of judicial review and postpones relief for the prevailing party who has been found entitled to an equitable remedy. *United States v. State of Tex.*, 523 F. Supp. 703, 729 (E.D. Tex. 1981).

238. *See American Rice, Inc. v. Ark. Rice Growers Co-op Ass'n*, 701 F.2d 408, 411 n.2 (5th Cir. 1983). *Cf. supra* note 236 (four factors as mixed questions).

239. *See State of New York v. Nuclear Regulatory Comm'n*, 550 F.2d 745, 750-52 n.6 (2d Cir. 1977).

peculiar requirements of equity jurisdiction.²⁴⁰ The Supreme Court has stated that "the scope of a district court's equitable power to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."²⁴¹ The "abuse" deference is often given, for example, to the judge's remedy in desegregation cases.²⁴² The district court apparently has similar authority when *applying* its equitable remedy. In reviewing a trial judge's decision that one party had not violated his injunction, the courts have stated: "We see no basis for substituting our judgment for that of the district judge in interpreting his own order."²⁴³

The Federal Declaratory Judgment Act permits the district court to declare the rights of the parties before it.²⁴⁴ In the Eleventh Circuit, the decision to take a case under the Act is discretionary to the court, though it may not decline by whim.²⁴⁵ Other circuits permit broader review, citing the liberal purpose of the statute as circumscribing the trial court's discretion.²⁴⁶ Declaratory jurisdiction may, at any rate, be

240. These requirements, including inadequacy of legal remedy, property interest, and lack of equitable defenses, seem subject to legal definition by the reviewing court, though the district judge, in weighing the facts and fashioning a remedy, is exercising discretion. *Cf. Firefighters Local Union No. 1784 v. Stotts*, ___ U.S. ___, 104 S. Ct. 2576, 2585 n.8 (1984) (implying review more circumscribed for preliminary injunctions than with permanent relief).

241. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). *See also Keyes v. Denver School Dist.*, 396 U.S. 1215, 1216 (1969) (Brennan, J., in chambers). While the appeals court is "free to re-assess the district court's conclusions of law, its findings of fact must be accepted unless clearly erroneous." *Ross v. Houston Indep. School Dist.*, 699 F.2d 218, 226 (5th Cir. 1983). *See also Baylor v. Jefferson County Bd. of Educ.*, 733 F.2d 1527 (11th Cir. 1984).

242. *See Valley v. Rapides Parish School Bd.*, 702 F.2d 1221, 1225 (5th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 276 (1984).

243. *See Farmhand, Inc. v. Abel Eng'g Indus., Inc.*, 693 F.2d 1140, 1146 (5th Cir. 1982) (quoting *Securities & Exchange Comm'n v. Sloan*, 535 F.2d 679, 681 (2d Cir. 1976), *cert. denied*, 430 U.S. 966 (1977)).

In criminal contempt cases, review of the sentencing decision is by the abuse test. *United States v. Leyva*, 513 F.2d 774, 779 (5th Cir. 1975).

244. 28 U.S.C. § 2201 (1982).

245. *Hollis v. Itawamba County Loans*, 657 F.2d 746, 750 (1981). *Accord Duggins v. Hunt*, 323 F.2d 746 (10th Cir. 1963). A distinction should be made, of course, between the decision to decide and the decision on the merits of the action.

Similarly, general abstention decisions are also subject to abuse review. *See Midkoff v. Tom*, 702 F.2d 788, 789 n.1, 799 (9th Cir. 1983). But once jurisdiction is found proper, the court normally should not abstain absent exceptional circumstances. *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038, 1046 (11th Cir. 1982).

246. *E.g., Alsager v. District Court of Polk County*, 518 F.2d 1160 (8th Cir.

inappropriate where the issues are speculative or one party is attempting a game of "procedural fencing."²⁴⁷

v. Pendent Jurisdiction

The exercise of pendent jurisdiction over state law claims combines both mandatory (jurisdictional minimum) and discretionary (appropriateness of keeping state claims) elements.²⁴⁸ Even when the district judge is acting within her "discretion," however, she ordinarily "should" dismiss pendent state claims if the federal claims are dismissed before trial.²⁴⁹

vi. Leave to Amend

Permission to amend pleadings under Rule 15 presents a subtle quirk in the judge's usual discretion. Where a party is not entitled to amendment as of right, he may apply to the court for leave, "and leave shall be freely given when justice so requires."²⁵⁰ But the court's decision—either granting or denying leave—is committed to its discretion,²⁵¹ reversible only where abuse is found.²⁵² Factors justifying denial include prejudice to the opponent, undue delay and dilatory motive, bad faith, repeated failure to cure deficiencies, and the futility of amendment.²⁵³ Denial is also more likely affirmed if denial is made after summary judgment, although not necessarily affirmed if other re-

1975); *Beacon Const. Co. v. Matco Elec. Co.*, 521 F.2d 392 (2d Cir. 1973). See *FEDERAL PROCEDURE* § 23:37 (Lawyers Ed. 1982).

247. *Hollis*, 657 F.2d at 750 (discussing factors). See *FEDERAL PROCEDURE*, *supra* note 246, § 23:9.

248. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-26 (1966). See generally Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CALIF. L. REV. 1399 (1983).

249. *E.g.*, *Gibbs*, 383 U.S. at 726; *Kavit v. A.L. Stamm & Co.*, 491 F.2d 1176, 1179-80 (2d Cir. 1974).

250. *FED. R. CIV. P.* 15(a).

251. *E.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). This discretion is said to be similar to that for supplemental pleadings. See *Lewis v. Knutson*, 699 F.2d 230 (5th Cir. 1983). Rule 15(d), governing the latter, makes no particular requirement of liberal amendment.

252. *Gregory v. Mitchell*, 634 F.2d 199, 203 (5th Cir. 1981).

253. *Zenith Radio*, 401 U.S. at 331; *Foman v. Davis*, 371 U.S. 178, 182 (1962). The court, in fact, requires the trial judge to consider prejudice. See *Zenith Radio*, 401 U.S. at 331.

lief motions have been granted.²⁵⁴ Normally, however, leave should be granted, for although review is limited to determining whether the trial court's decision is an abuse of discretion, the policy of liberal amendment directs that "unless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial."²⁵⁵ The quirk is that liberal amendment clashes with court discretion, at least when the judge denies amendment.²⁵⁶ While the "abuse" test is said to apply in either case, in practice "the" test is applied differently. Where amendment is allowed, affirmance is routine; a denial also is often affirmed, but the appellate court nearly always applies and analyzes the relevant factors itself in determining whether denial was abuse. Some courts, then, find the factors wanting and reverse the district court.²⁵⁷

Moreover, it is likely that the judge's discretion will be checked more in future cases. Application of the abuse standard was developed under case law which gave no preclusive effect to the judge's discretionary call. The new Fifth Circuit, sitting en banc, has recently ruled, however, that res judicata principles may be applied to claims for which amendment was denied.²⁵⁸ While the direct impact of this decision remains to be felt, reviewing courts may be much more reluctant to affirm, as a matter of course, the judge's discretion where the denied amendment, in theory freely given, extinguishes a claim forever.²⁵⁹

vii. "Discretion": A Final Note

The tension inherent in the leave to amend cases—where discre-

254. See, e.g., *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 & n.2 (5th Cir. 1981); *Freeman v. Continental Gin Co.*, 381 F.2d 459, 469 (5th Cir. 1967).

255. *Dussouy*, 660 F.2d at 598. Denial is also affirmed where no legal basis exists for the amended claim or defense.

256. An early court cautioned that amendment is not a mechanical absolute, implying that it is nonetheless rarely denied—a liberal policy which may be said to conflict with narrow "abuse" review. *Freeman*, 381 F.2d at 468. The standard, though consistently cited today, is not necessarily uniformly applied or implied between circuit panels. Compare *Dussouy*, 660 F.2d at 598-99, with *Daves v. Payless Cashways, Inc.*, 661 F.2d 1022, 1024 (5th Cir. 1981).

257. E.g., *Dussouy*, 660 F.2d at 599. Other courts, though affirming, at least probe the "discretionary" decision. See, e.g., *Union Planters*, 687 F.2d at 121; *Daves v. Payless Cashways, Inc.*, 661 F.2d 1022, 1024 (5th Cir. 1981).

258. *Nilsen v. City of Moss Point*, 701 F.2d 556 (5th Cir. 1983)(en banc).

259. See *McKee v. McDonnell Douglas Technical Servs., Inc.*, 705 F.2d 776 (5th Cir. 1983)(denial of rehearing en banc).

tion is the standard but review is often probing, employing established guidelines—also reveals itself in other discretionary situations, including discovery and involuntary dismissal. The court gives a theoretically free hand to the district judge but immediately creates impediments and establishes qualifications for exercising the discretion. On appeal the result is often something of a hybrid “abuse” test where abuse is more commonly found and less pejoratively implied.²⁶⁰ It must be asked, then, whether the circuit in fact employs at least two “abuse of discretion” standards. Though “the” test is the same, there seems to be a real distinction, in common sense and review standard, between a judge’s approval of amendment—blessed by Rule 15(a)—and the denial of leave. The court appears to have responded, at least implicitly, to a perceived difference in these twins and other situations.

Of course, the addition of factors to be considered in exercising discretion is not necessarily freer review, and the courts often frame the factors not as the rationale for broader review of abuse but as elements pointing to an abuse where incorrectly considered. In some situations, however, the appeals court may be *doing* more, resulting in a freer appellate hand. If the court makes a tacit distinction between two or more “abuse” standards, the dividing line might be seen as “true” discretion, where real trial authority translates into effectively restricted review.²⁶¹ Such a line might underlie the oft-quoted but unexplained juxtaposition of review for “abuse” and review for “clear abuse”²⁶² (if there *is* a difference), though the court does not appear to be consciously pursuing a distinction. In application, for example, the courts do not indicate that abuse is present but not clear.

In the final analysis, however, the concept of discretion quite naturally fights uniformity, so it should not be surprising that *review* of

260. The courts state, however, that a finding of abuse of discretion is not a pejorative label upon the trial judge. *E.g.*, *Sam’s Style Shop v. Cosmos Broadcasting Corp.*, 694 F.2d 998 (5th Cir. 1982). Nevertheless, an ironic consequence of the way review standards are often phrased is the number of jurors who are labeled “unreasonable” and the relative frequency with which district judges, whose power is solemnly granted, are said to have “abused” it.

261. See *supra* notes 180-83. See generally Rosenberg, *supra* note 189. Professor Rosenberg discerns at least four levels of discretion in action. See also *Chris-Craft Indus., Inc., v. Piper Aircraft Corp.*, 480 F.2d 341, 389 (2d Cir.) (in comparing “the” abuse test for grants versus denials of SEC injunction, judge notes “scope of review would appear to be different,” but urges abuse to be found “whatever abuse of discretion standard be applied”), *cert. denied*, 414 U.S. 910 (1973).

262. See *supra* note 189.

discretion is not always consistently applied or even theorized. Nevertheless, the circuit has broadly set out one abuse of discretion inquiry as the standard for reviewing district courts' trial and supervisory roles.

2. Jury Instructions

a. Form and Content

The form of jury instruction and the method of objection are considered procedural points. The federal courts look to federal law in framing instructions at trial and in reviewing charge form on appeal.²⁶³ Where state law defines the contested right or action, however, state law of course governs the substance of the charge.²⁶⁴ The actual content of jury instructions presents, then, a question of substantive law rather than standard of review, and legal errors are freely reversed if prejudicial. In reviewing the manner of instruction, the federal courts are not always picky about language and format. As long as the jury is not misled, prejudiced, or confused, "[a] party is not entitled to have the jury instructed in the particular language of its choice."²⁶⁵ The reviewing court considers "the charge as a whole, viewing it in light of the allegations of the complaint, the evidence, and the arguments of counsel."²⁶⁶ These principles have also been applied where the appellant complained of the timing of portions of the charge.²⁶⁷ Similarly, the court's choice to submit the case in the form of a special verdict is said to be within its discretion.²⁶⁸

263. *Reyes v. Wyeth Laboratories*, 498 F.2d 1264 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974). One reflection of the differing federal approach is the power to comment on the evidence. *See supra* note 205 and accompanying text.

264. *See, e.g.*, 9 C. WRIGHT & A. MILLER, *supra* note 66, § 2555, at 651-52 (1971).

265. *Baker & Co., Fla. v. Preferred Risk Mut. Ins. Co.*, 569 F.2d 1347, 1350 (5th Cir. 1978).

266. *Smith v. Borg-Warner Corp.*, 626 F.2d 384, 396 (5th Cir. 1980). "If, viewed in that light, the jury instructions are comprehensive, balanced, fundamentally accurate, and not likely to confuse or mislead the jury, the charge will be deemed adequate." *Scheib v. Williams-McWilliams Co.*, 628 F.2d 509, 511 (5th Cir. 1980).

267. *See Farmhand, Inc. v. Anel Engineering Industries, Inc.*, 693 F.2d 1140, 1142 n. 1 (5th Cir. 1982). *See generally supra* note 166 for review of supplemental instructions.

268. *See* C. WRIGHT, *supra* note 197, § 94, at 630-31. *See also supra* note 165.

b. The Test: Technical Errors and the Jury's Function

The circuit has indicated that review of jury instructions is not a search for utopia or an exercise in technicalities. As one court summarized the standard:

A technical imperfection does not occasion reversal when it is part of a charge that otherwise adequately instructs the jury on the applicable law. We must determine 'not whether the charge was faultless in every particular but whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine those issues.' If the charge as a whole 'leaves us with substantial and ineradicable doubt whether the jury has been properly guided in its deliberations' it cannot stand.²⁶⁹

In sum, then, "[i]nstructions are considered adequate if the jury is given an appropriate understanding of the controlling law and of its role in the decision-making process"²⁷⁰ Even where language and form is placed in the hands of the trial judge, the Eleventh Circuit will reverse where the charge fails these principles.²⁷¹

c. "Plain Error"?

Rule 51 provides: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."²⁷² Since no "plain error" exception is supplied, as is specifically the case in criminal cases under

269. *McCullough v. Beech Aircraft Corp.*, 587 F.2d 754, 759 (5th Cir. 1979)(citations omitted). See also *McGuire v. Davis*, 437 F.2d 570, 573-74 (5th Cir. 1971).

McCullough, quoting *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1100 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974), states one aspect of the test as requiring that the jury not be misled in any way. *Id.* at 759. Other courts ask whether the charge is likely to mislead. See *Scheib*, 628 F.2d at 511. The possible variation in the language, however, is not presented as inconsistent in theory or application. See also *Johnson v. Bryant*, 671 F.2d 1276, 1280 (11th Cir. 1982)("ineradicable doubt").

270. *Farmhand*, 693 F.2d at 1142.

271. See, e.g., *Williams v. Bennett*, 689 F.2d 1370, 1387-88 (11th Cir. 1982). See also *Pryor v. Gulf Oil Corp.*, 704 F.2d 1364, 1374-75 (5th Cir. 1983)(instructions insufficient, misleading, and confusing); *McCullough*, 587 F.2d at 759 (contradictory charge and summation constituted erroneous directed verdict).

272. FED. R. CIV. P. 51.

the federal rules,²⁷³ the civil rule literally means *no* review. Some circuits, including the Ninth, openly apply Rule 51 strictly.²⁷⁴ Some old Fifth Circuit panels appeared to find themselves precluded from review without suggesting a plain error exception.²⁷⁵ Many former Fifth Circuit cases, however, have indicated such an exception. Most of these offer the exception in dicta, finding that if there were error it would not be "plain."²⁷⁶ Other courts, especially recently, have found that plain error was present and reversed accordingly.²⁷⁷ The circuit also appears willing to consider an objection adequate under a lenient objection rule, at least where it brings the trial court's attention to the defect.²⁷⁸ Moreover, requested instructions are not necessary to preserve error in failing to instruct on the controlling issues or in giving erroneous or misleading instructions.²⁷⁹

3. Motions for Judgment or Relief

a. Rule 12(b)(6) Dismissal

A district court considering a Rule 12(b)(6) motion is told that "a motion to dismiss for failure to state a claim should not be granted

273. See FED. R. CRIM. P. 52(b).

274. See *Bock v. United States*, 375 F.2d 479 (9th Cir. 1967). The Third Circuit, on the other hand, has increasingly reversed for plain error.

275. E.g., *Landry v. Two R. Drilling Co.*, 511 F.2d 138, 141 (5th Cir. 1975). Such cases simply fail to mention a possible exception to the no-review rule.

276. See, e.g., *Hoover, Inc. v. McCullough Indus.*, 380 F.2d 798, 801 (5th Cir. 1967) (no error found; exception by comparison to prejudicial argument cases); *Pruett v. Marshall*, 283 F.2d 436, 441 (5th Cir. 1960). See *DeJoris v. United States*, 409 F.2d 2 (5th Cir.), cert. denied, 396 U.S. 830 (1969). Cf. *Rivers v. Angf. A/B Tirfing*, 450 F.2d 12 (5th Cir. 1971) (charge not fundamentally erroneous).

277. See, e.g., *Jamison Co., Inc. v. Westvaco Corp.*, 526 F.2d 922, 932-33, reh'g denied, 530 F.2d 34 (5th Cir. 1976); *Industrial Dev. Bd. v. Fuqua Industries, Inc.*, 523 F.2d 1226, 1237-40 (5th Cir. 1975). Most of these cases also call the error "fundamental" or a "miscarriage." See also cases cited in *Rodrigue v. Dixilyn Corp.*, 620 F.2d 537, 540-41 (5th Cir. 1980) (setting out the standard).

278. See *Pryor v. Gulf Oil Corp.*, 704 F.2d 1364, 1375-76 (5th Cir. 1983). See also note 251. But see *Hall v. Crown Zellerbach Corp.*, 715 F.2d 983, 988-89 (5th Cir. 1983).

279. See 9 C. WRIGHT & A. MILLER, *supra* note 66, § 2556 (1971) ("[t]he court must instruct the jury properly on the controlling issues of the case even though there has been no request for an instruction or the instruction requested is defective."). See generally *Pryor*, 704 F.2d at 1375-76. Cf. *Herman v. Hess Oil*, 524 F.2d 767, 771 (3d Cir. 1975) (invited error).

unless it appears to a certainty that the plaintiff would not be allowed to recover under any state of facts which could be proved in support of his claim."²⁸⁰ The appellate court reviews under the same standard.²⁸¹ The federal courts generally read the plaintiff's allegations liberally: "The form of the complaint is not significant if it alleges facts upon which relief can be granted, even if it fails to categorize correctly the legal theory giving rise to the claim."²⁸² The liberalization of complaint construction and procedures has led Professor Miller to note the decline of Rule 12(b)(6), remarking that it was last used "during the McKinley Administration."²⁸³

Rule 12(b)(6) applies where one party challenges the legal claim presented in a pleading; after pleadings are closed either party may move for judgment on the pleadings under Rule 12(c). In either case, where matters outside the pleadings are considered, the court must use the standard and procedures for summary judgment under Rule 56,²⁸⁴ though as a practical matter the legal inquiry may be similar since facts are not material if they carry no legal import.²⁸⁵

b. Summary Judgment

i. "Material Fact": Test and Burdens

Summary judgment is appropriate if the full record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."²⁸⁶ On review the

280. *Sims v. Adams*, 537 F.2d 829, 831 (5th Cir. 1976). See generally *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); 5 C. WRIGHT & A. MILLER, *supra* note 66, § 1357, at 598 (1969)(motion disfavored and rarely granted).

281. See *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Haines v. Kerner*, 404 U.S. 519 (1974); *Fontana v. Barham*, 708 F.2d 221, 227 (5th Cir. 1983).

282. *Dussouy*, 660 F.2d at 604. Cf. *Daves*, 661 F.2d 1022 (5th Cir. 1981); FED. R. CIV. P. 9(b). The court in evaluating the motion takes the factual allegations as true and in the light most favorable to plaintiffs. E.g., *Scheuer*, 416 U.S. at 235-37. An even less stringent pleading standard is applied to *pro se* complaints, for example in § 1983 actions. See *Watts v. Graves*, 720 F.2d 1416, 1419 (5th Cir. 1983).

283. Quoted in Carter, Panel "Inquires"—Is Bok Wrong?, Harv. L. Record, Dec. 9, 1983, at 2.

284. See FED. R. CIV. P. 12(b)(6) and 12(c). See generally *infra* note 286.

285. See *infra* note 289. Generally, however, the Rule 12(b)(6) focus is on law while Rule 56 is on "material" facts; moreover, different procedures and materials are used. For the requirement of written findings and conclusions, see *infra* note 296.

286. FED. R. CIV. P. 56(c). Everything in the record, including depositions and affidavits, is considered, unlike in the pre-trial dismissal situation. See also Underwood

appellate court applies the same test as the district courts.²⁸⁷

The court may not weigh the evidence or its probative value, nor may the court resolve any factual issues discerned in the record,²⁸⁸ but a factual dispute without legal significance is not "material."²⁸⁹ Material facts are those which may affect the outcome of litigation.²⁹⁰ The moving party carries the burden, an "exacting" one, of demonstrating absence of fact and entitlement to judgment, so that the evidence, and all inferences therefrom, must be viewed in the light most favorable to the opponent and all reasonable doubts resolved in his favor.²⁹¹ Thus, even where all facts are known or stipulated, summary judgment may nonetheless be inappropriate:

v. Hunter, 604 F.2d 367, 369 (5th Cir. 1979)(judge may *sua sponte* convert motion to dismiss into summary judgment motion but must then comply strictly with Rule 56).

The plaintiff or the defendant may move for summary judgment as to all or part of a claim or defense. The motion may be granted in equity. Even where the mechanism is appropriate, the court may in its discretion deny the motion. C. WRIGHT, *supra* note 197, § 99, at 663-65, 667, 669. See generally Bruce v. Travelers Ins. Co., 266 F.2d 781, 786 (5th Cir. 1959); Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745 (1974).

In diversity cases, the federal Rule 56 standard still controls. Nunez v. Superior Oil Co., 472 F.2d 1119, 1123 n.5 (5th Cir. 1978). But the legal issues underlying the action are of course creatures of state law.

287. See, e.g., Thrasher v. State Farm Fire and Casualty Ins. Co., 734 F.2d 637 (11th Cir. 1984); United States Steel Corp. v. Darby, 516 F.2d 961 (5th Cir. 1975).

288. E.g., Miles v. American Telephone & Telegraph Co., 703 F.2d 193, 195 (5th Cir. 1983). Cf. Robin v. Wilson Brothers Drilling, 719 F.2d 96, 98 (5th Cir. 1983)(court in new trial situation may weigh evidence). Nor may the court consider inadmissible evidence. Freeman v. Continental Gin Co., 381 F.2d 459 (5th Cir. 1967).

289. See Union Planters Nat'l Leasing Co. v. Woods, 687 F.2d 117, 119 (5th Cir. 1982)("contested fact must have some legal significance to be material to the resolution of a case"). Thus the court has stated, in language similar to the test for Rule 12(b)(6) motions, that summary judgment normally is granted "only when the moving party has established his right to judgment with such clarity that the nonmoving party cannot recover . . . under any discernible circumstance." Everhart v. Drake Mgmt., Inc., 627 F.2d 686, 690 (5th Cir. 1980). See *infra* note 292.

290. See Kennett-Murray Corp. v. Bone, 622 F.2d 887, 892 (5th Cir. 1980).

291. E.g., Thrasher, 734 F.2d at 639; Impossible Elec. Techniques, Inc. v. Wackenhut Protective Sys., 669 F.2d 1026, 1031 (5th Cir. 1982); Joplin v. Bias, 631 F.2d 1235, 1237 (5th Cir. 1980); Stafford v. United States, 611 F.2d 990 (5th Cir. 1979). See also United States v. Diebold, Inc., 369 U.S. 654 (1962). The motion is denied where "reasonable minds might differ on the inferences arising from undisputed facts," *Impossible Elec.*, 669 F.2d at 1031. Cf. O'Brien v. Eli Lilly & Co., 668 F.2d 704 (3d Cir. 1981)(Higginbotham, J., dissenting).

There is no litmus that infallibly distinguishes those issues that are "factual" from those that are "legal" or "mixed." When all those material facts susceptible of objective determination are known, there may be inferences or conclusions to be drawn from them. Many observations that may appear superficially to be factual are the result of inference, viewpoint, and judgment. At ends of the spectrum, it may be relatively easy to separate fact and law, but as we approach the point where facts and the application of legal rule to them blend, appraising evidentiary facts in terms of their legal consequences and "applying" law to fact become inseparable processes. In some instances where facts may assume infinite variety, legal rules are deliberately stated in a fashion calling for the application of judgment.²⁹²

Although the moving party maintains the burden under Rule 56, when a motion is made and properly supported,

an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.²⁹³

The non-moving party, then, "is required to bring forward 'significant probative evidence' demonstrating the existence of a triable issue of fact."²⁹⁴ Additionally, the nonmover cannot present one view of the purported factual dispute (or legal theory of its materiality) to the trial

292. *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1123 (5th Cir. 1978). *Nunez* cites jury sufficiency cases, including *Boeing* and *Liberty Mutual*, in reversing summary judgment, and notes that inferences and ultimate facts are for the jury, subject to reversal if the evidence is insufficient to sustain the resultant findings. *Nunez*, 572 F.2d at 1124 & n.6. In theory, however, the summary judgment inquiry is different from the j.n.o.v. situation since inferences under Rule 56 are not really left to the jury but are decided, against the movant, in determining the propriety of summary judgment. See *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289-90 (1968)(summary judgment vehicle typically appropriate where only issue is the legal significance to be ascribed to undisputed record facts).

Rule 56(c) also provides for procedural protections different from those under Rule 12, including ten day notice before hearing. See *infra* note 296.

293. FED. R. CIV. P. 56(e). Thus, "[d]efense of a proper summary judgment motion requires more than a mere denial." *Union Planters*, 687 F.2d at 119.

294. *Ferguson v. Nat'l Broadcasting Co.*, 584 F.2d 111, 114 (5th Cir. 1978). See also *Solomon v. Houston Corrugated Bar Co.*, 526 F.2d 389, 396 (5th Cir. 1976).

court—only to raise a new tack on appeal.²⁹⁵

ii. Trial Court Findings and Appellate Record Review

In addition to the Rule 56 duties imposed on the parties, the district court is often said to have its own responsibility to delineate its basis for granting summary judgment:

“Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 and 56,” [and] their absence here is not, of itself, fatal. Even so, “the parties are entitled to know the reasons upon which [summary] judgment[s] . . . are based,” if for no other reason than to secure meaningful appellate review. Although our prior admonitions have been precatory in character, we have in practice insisted that district courts record—however informally—their reasons for entering summary judgment, at least where their underlying holdings would otherwise be ambiguous or inascertainable.²⁹⁶

In a similar vein, a recent court has noted a conflict in the case law on the question of whether the appellate court is to make an independent review of the record to find a factual dispute which the appellant has not pointed out. “Judges are not ferrets!,” the court complained, but searched the record anyway and reversed.²⁹⁷

iii. Appropriateness in Specific Applications

“Summary judgment is, of course, Damoclean and lethal. It can serve as a quick sword untangling the Gordian knot of litigation.”²⁹⁸

295. See, e.g., *DeBardleben v. Cummings*, 453 F.2d 320, 324 (5th Cir. 1972). The cases do not consistently require such care from the parties. Cf. *infra* note 279 and accompanying text. But a party's failure to properly bring facts or legal theories to the trial court's attention may constitute actual abandonment of the issues. See generally *infra* notes 355-62 and accompanying text.

296. *Hanson v. Aetna Life & Casualty*, 625 F.2d 573, 575 (5th Cir. 1980)(citations omitted).

A recent Fifth Circuit case emphasized that these findings must be evaluated under Rule 56(c), not the clear error rule of Rule 52(a). *New York Life Ins. Co. v. Baum*, 707 F.2d 870, 871 (5th Cir. 1983)(on rehearing).

297. *Nicholas Acoustics & Specialty Co. v. H & M Const. Co.*, 695 F.2d 839, 847 (5th Cir. 1983).

298. *Id.* at 844. See also *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940).

The mechanism is not to be used unless manifestly inappropriate. The court has indicated that summary judgment is particularly inappropriate as a general matter in certain classes of cases. For example, "[o]rdinarily, summary disposition of Title VII cases is not favored, especially on a 'potentially inadequate factual presentation.'"²⁹⁹ Summary judgment is normally—but not always—inappropriate when the issues involve negligence or a determination of the reasonableness of the parties' acts under the circumstances.³⁰⁰

The Supreme Court has similarly stated: "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."³⁰¹ Nevertheless, lower courts have expressed their willingness to affirm summary judgments in appropriate antitrust cases, especially where tangible and objective issues are involved, though the procedure is generally to be avoided.³⁰² Other cases indicate that summary judgment may not be proper in securities actions prior to completion of discovery,³⁰³ and the procedure may be cautiously applied where the issue is novel or the case is complex.³⁰⁴ Critics blame this hesitance in complex cases, as with liberality in other procedural vehicles, for clogging the federal courts.³⁰⁵

c. Rule 41(b) Dismissal

In bench trials after the plaintiff concludes his case, the defendant may move for dismissal of the action, arguing "that upon the facts and

299. *Jones v. Western Geophysical Co.*, 669 F.2d 280, 283 (5th Cir. 1982)(quoting *Logan v. General Fireproofing Co.*, 521 F.2d 881, 883 (4th Cir. 1971)), *quoted in* *Trevino v. Celanese Corp.*, 701 F.2d 397 (5th Cir. 1983).

300. *See* *Gross v. Southern Ry.* 414 F.2d 292 (5th Cir. 1969). *Cf.* *Crum v. Continental Oil Co.*, 471 F.2d 784 (5th Cir. 1973)(allowing summary judgment); *Panter v. Marshall Field & Co.*, 646 F.2d 271, 282 (7th Cir.)(directed verdict on motive and good faith), *cert. denied*, 454 U.S. 1092 (1981).

301. *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962).

302. *See* *Ferguson*, 584 F.2d at 114. *See also* Sponsler, *Fifth Circuit Symposium: Antitrust Law*, 28 LOY. L. REV. 775, 785 (1982).

303. *Schoenbaum v. Firstbrook*, 405 F.2d 215, 218 (2d Cir. 1968)(en banc), *cert. denied*, 395 U.S. 906 (1969).

304. *See* *White Motor Co. v. United States*, 372 U.S. 253 (1963); *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948); 10 C. WRIGHT & A. MILLER, *supra* note 66, § 2725 (1973).

305. *See* *Carter*, *supra* note 283, at 2.

the law the plaintiff has shown no right to relief.”³⁰⁶ The court may defer the motion until the close of the case or, finding the evidence insufficient, render judgment on the merits and make Rule 52(a) findings.³⁰⁷ The trial court is said to weigh the evidence, even on a motion made only after plaintiff has offered evidence.³⁰⁸

The substantive Rule 41(b) motion is roughly analogous to the directed verdict motion offered at the same time in jury trials. But the judge passing on a directed verdict or j.n.o.v. motion, to preserve the jury function, must view the evidence in the light favoring the nonmover. In nonjury cases under Rule 41(b), however, the judge is said to be not so limited and may resolve credibility and evidentiary conflicts.³⁰⁹ As one recent court clarified: “Although the court disposed of the [limitations] issue through the vehicle of a motion for directed verdict, the issue was actually tried to the court as fact finder, and it made, in effect, findings of fact and conclusions of law thereon. The *Boeing* standard was therefore inapplicable.”³¹⁰

d. New Trial

i. Discretion and General Applications

Rule 59 permits a trial court to grant a new trial, after motion or on its own initiative, on any or all issues in a jury or bench trial.³¹¹ Common grounds on which such a motion is based include legal error (e.g., in instructions or evidentiary calls), improper conduct (of judge, attorney, or juror), new evidence, and verdict contrary to evidence. The trial court’s decision generally is committed to its discretion.³¹² For ex-

306. FED. R. CIV. P. 41(b). Defendant can so move at the close of the case, though then the court must render judgment anyway. See *supra* note 225 for dismissal under Rule 41 on grounds other than insufficient evidence.

307. See *supra* note 30 and accompanying text.

308. See *Weissinger v. United States*, 423 F.2d 795 (5th Cir. 1970)(en banc).

309. C. WRIGHT, *supra* note 197, § 96, at 645.

310. *Emmons v. Southern Pacific Transportation Co.*, 701 F.2d 1122, 1119 (5th Cir. 1983)(footnote omitted).

311. FED. R. CIV. P. 59. The motion “shall be served not later than 10 days after the entry of judgment.” FED. R. CIV. P. 59(b). See also FED. R. CIV. P. 59(d)(court initiative) and 59(e)(alter or amend). See generally 11 C. WRIGHT & A. MILLER, *supra* note 66, §§ 2812, 2813 (1973). A 1966 amendment provides that the court may act on grounds not stated in a motion. FED. R. CIV. P. 59(d).

312. See generally *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940);

ample, a motion for new trial based on inflammatory argument or other improper remarks is a matter committed to the sound discretion of the trial judge,³¹³ reversible only for abuse.³¹⁴ Justification for this deference echoes that which is given to other exercises of discretion:

The district judge . . . was best able to measure the impact of improper argument, the effect of the conduct on the jury, and the results of his effort to control it. Our review is not only hindsight, but is based on a written record with no ability to assess the impact of the statement on the jury or to sense the atmosphere of the courtroom.³¹⁵

The courts may find that the earlier "failure to move for a mistrial is also significant" in reviewing the propriety of the ultimate new trial motion, since the party "[b]y doing so, and by acquiescing in the court's corrective charge, . . . got a chance to see the verdict and then to seek to overturn it"³¹⁶—an advantage apparently viewed as unfair.

ii. Weight of the Evidence

Where an appeal is made from an order denying or granting a new trial (the latter reviewed after a second trial) on the basis of legal error, the appellate court may simply review for such error. The more

Massey v. Gulf Oil Corp., 508 F.2d 92, 93 (5th Cir.), *cert. denied*, 423 U.S. 838 (1975); United States *ex rel.* Weyerhaeuser Co. v. Bucon Constr. Co., 430 F.2d 420, 423 (5th Cir. 1970).

The Supreme Court has recently defined the proper factors and procedures the trial court is to consider in determining a new trial motion for juror bias in civil cases. *See McDonough Power Equip., Inc. v. Greenwood*, ___ U.S. ___, 104 S. Ct. 815 (1984). The Court in *McDonough Power* stated that a party seeking a new trial based on juror prejudice or bias must demonstrate that the juror in question failed to answer honestly a material question posed on voir dire. In addition, the party must show that a honest answer would have provided a valid basis for a challenge for cause. *See id.* at 849-50.

313. *Meyers v. Moody*, 693 F.2d 1196 (5th Cir. 1982). *See Rosenberg, supra* note 13, at 178.

314. *Caldadera v. Eastern Airlines, Inc.*, 705 F.2d 778 (5th Cir. 1983).

315. *See id.* at 781-82.

316. *Id.* at 782 (footnote omitted). The courts also appear influenced by a judge's quick or thorough limiting of prejudice by corrective instruction. *See id.* at 781-82. Review generally may narrow to the question whether "the damage done by this inflammatory argument was irreparable. . ." with the trial judge in the superior position from which to evaluate prejudice. *Id.* at 781.

difficult cases, however, involve evidence-weighting, necessarily involving factual inquiry. The trial court's decision on a new trial motion for lack of evidentiary support again is subject to review only for an abuse of discretion.³¹⁷ In exercising this discretion in granting the motion, however, the trial court is warned not to merely substitute its view or doubts about the evidence for those of the jury,³¹⁸ though it is said that the trial court on a new trial motion has the discretion to consider both the weight of the evidence³¹⁹ and the credibility of witnesses. The standard by which the appellate court checks for abuse is the same as the one guiding its exercise by the trial court: the trial court may not grant a new trial unless the verdict is "against the great weight of the evidence,"³²⁰ and the reviewing court will not affirm such a decision unless the "great weight" line is broken.³²¹ Reversals have thus been ordered where there is "no great weight of the evidence in any direction."³²²

Although "[t]he 'great weight of the evidence' standard is not easily met,"³²³ or for that matter easily defined,³²⁴ it is clear that the verdict is not as safe under this test as where the verdict is challenged as a matter of law under a j.n.o.v. motion; "the court has a wide discretion in setting aside a verdict and granting a new trial even if the verdict is supported by substantial evidence."³²⁵ This discretion is allowed, even in the face of the seventh amendment, possibly, because the verdict is not flatly reversed—the parties instead just get a new jury. The circuit has even, rarely, reversed trial court findings that a verdict is *not* against the weight of the evidence.³²⁶ Nevertheless, the jury's verdict is

317. See, e.g., *Saunders v. Chatham County Bd. of Comm'rs*, 728 F.2d 1367 (11th Cir. 1984); *Spurlin v. General Motors Corp.*, 528 F.2d 612 (5th Cir. 1976). See also *McGuire v. Davis*, 437 F.2d 570, 576 (5th Cir. 1971) ("manifest abuse"); *Weyerhaeuser*, 430 F.2d at 423 ("clear abuse").

318. See *Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360 (5th Cir. 1980).

319. See *Robin v. Wilson Brothers Drilling*, 719 F.2d 96, 98 (5th Cir. 1983).

320. E.g., *Taylor v. Fletcher Properties, Inc.*, 592 F.2d 244, 247 (5th Cir. 1979).

321. E.g., *Narcisse v. Ill. Cent. Gulf RR Co.*, 620 F.2d 544 (5th Cir. 1980). See also *Weyerhaeuser*, 430 F.2d at 423 (against "clear weight" or a miscarriage of justice). Some cases apply the "great weight" test without first setting it up as the standard by which the judge's discretion is directed and checked for abuse. E.g., *Perricone*, 704 F.2d at 1376.

322. *Conway*, 610 F.2d at 367.

323. *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927, 931 (5th Cir. 1982).

324. See C. WRIGHT, *supra* note 197, § 95, at 639 (4th ed. 1983).

325. *Abshire v. Seacoast Products, Inc.*, 668 F.2d 832, 837 (5th Cir. 1982).

326. *United States v. Simmons*, 346 F.2d 213 (5th Cir. 1965); *Georgia-Pacific*

given deference, especially where the issues are simple, the facts not strongly disputed, and trial conduct not pernicious.³²⁷

Although denial of a new trial motion is likewise said to be subject to "abuse of discretion" review, it is clear that more deference in practice is given to the district judge when she agrees with the jury. Where the "judge denies the motion and leaves undisturbed the jury's determination, all factors press in the direction of leaving the trial judge's ruling undisturbed" ³²⁸ Comity, common sense, and the seventh amendment, of course, support this extra reluctance, though the distinction is at odds with the notion that *the* abuse test is a single or uniform standard.³²⁹ Similarly, the like judgments of two successive juries is especially guarded; "courts rarely grant a new trial after two verdicts upon the facts in favor of the same party."³³⁰

iii. Conditional New Trial and Damages

The conditional grant of a new trial motion is governed by similar language. In such a case the district court or even appellate court indicates that it will order a new trial for damages unless the nonmoving party will consent to a judicial reduction of damages.³³¹ In the federal courts the issue is one of *excessive* damages—remedied by the conditional remittitur vehicle—since additur, for inadequate damages, is held to violate the seventh amendment.³³² The trial judge applying remittitur must actually offer the plaintiff a choice between reduction or

Corp. v. United States, 264 F.2d 161 (5th Cir. 1959). See also *Caldarera*, 705 F.2d 778 (5th Cir. 1983).

327. *Perricone*, 704 F.2d at 1381.

328. *Massey v. Gulf Oil Corp.*, 508 F.2d 92, 95 (5th Cir.), *cert. denied*, 423 U.S. 838 (1975). But see *supra* note 326 and accompanying text.

329. See generally *supra* notes 258-61 and accompanying text.

330. *Louisville & N.R. Co. v. Woodson*, 134 U.S. 628, 631 (1890).

331. See generally *Edwards*, 512 F.2d 276 (5th Cir. 1975) (reversing both verdict and judge's response and ordering new trial). See also *Narcisse*, 620 F.2d at 546; 11 C. WRIGHT & A. MILLER, *supra* note 66, §§ 2815, 2816 (1973); Note, *Remittitur Review: Constitutionality and Efficiency in Liquidated and Unliquidated Damage Cases*, 43 U. CHI. L. REV. 376 (1976).

332. See *Dimick v. Schiedt*, 293 U.S. 474 (1935); *Bonura v. Sea Land Serv.*, 505 F.2d 665 (5th Cir. 1974). Although the circuits once split on the question whether a party accepting remittitur may challenge the order on appeal, the Supreme Court now holds that the order is *not* subject to appellate review when consented to, even if the complaining party had given consent under protest. *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977).

new trial; otherwise the appeals court must remand for that selection.³³³ Use of remittitur is, not surprisingly, reviewed under an "abuse of discretion" standard.³³⁴ The jury's determination, of course, is afforded deference, especially where the trial judge approves it.³³⁵ "The jury's award is not to be disturbed unless it is entirely disproportionate to the injury sustained."³³⁶

The courts are not clear, in setting forth these principles, how the judge's discretion accords with the traditional deference given jury verdicts. It is, again, likely that "abuse" is found more rarely—or even reviewed differently (if such is a real analytical distinction)—where the judge agrees with the jury.³³⁷ Similarly, other courts³³⁸ do not clearly distinguish among the language accompanying flat orders of new trial, remittitur, and reversal of a jury's findings on damages.³³⁹ Perhaps all these situations could be summarized, beyond "abuse" language, as requiring that all courts defer to the reasonable jury and the appellate court in turn defer to the trial judge, especially where the judge's review affirms the jury's determination.³⁴⁰

333. *Higgins v. Smith Int'l*, 716 F.2d 278, 281 (5th Cir. 1983).

334. *See generally* *Sam's Style Shop v. Cosmos Broadcasting Corp.*, 694 F.2d 998 (5th Cir. 1982)(summarizing various former Fifth Circuit tests and language used to determine abuse, finding abuse by any of the standards, and ordering conditional new trial). *Cf. Hill v. Nelson*, 676 F.2d 1371 (11th Cir. 1982)(remittitur to stipulated damages of parties).

Nevertheless, the trial judge may not reduce the award below the maximum reasonable amount. *Bonura*, 505 F.2d at 669.

335. *See Caldarera*, 705 F.2d at 783-84 & n.15.

336. *See id.* at 784. Excessiveness of the verdict is judged from the base award, e.g., before trebling. *See Pope*, 703 F.2d 197 (5th Cir. 1983). New trial on damages may not be ordered unless the verdict is against the great weight of the evidence. *Narcisse*, 620 F.2d at 547.

337. *See supra* notes 328, 334-35 and accompanying text.

338. *See, e.g., Pope*, 703 F.2d at 208.

339. *See supra* note 172.

340. Whether the issue of damages is reviewed on its own terms or after initial trial judge review, it is said that "an examination of the [former] Fifth Circuit cases in this field reveals only rare instances in which the Court felt bound to set aside a jury award for its excessiveness." *Perricone*, 630 F.2d at 319. But where the trial judge exercises his discretion to reduce an award, abuse is found "only when it appears that the jury's original verdict was *clearly within* the universe of possible awards which are supported by the evidence." *Bonura*, 505 F.2d at 670 (emphasis in original).

iv. Discretion versus Law: J.N.O.V. Compared

Despite the blending in some damages cases, the court has distinguished generally between the new trial situation and the j.n.o.v. motion, which often accompanies a new trial motion. As one Fifth Circuit case summarized, in rejecting the argument that failure to move for a directed verdict precludes granting a new trial on evidence:

In passing a motion for a directed verdict, or for a judgment n.o.v., the court does not exercise discretion, but decides a pure question of law, that is, whether the evidence, considered in the light most favorable to the party against whom the motion is directed, affords substantial support for a verdict in his favor In passing on a motion for a new trial, the court may and should exercise a sound discretion, and its ruling thereon will not be reviewed in an appellate court in the absence of a clear abuse of discretion.³⁴¹

This distinction, the court added, "was firmly embedded in the common law" and recognized by the former Fifth and other circuits.³⁴²

Some courts also distinguish between j.n.o.v. and new trial in the context of evidence considered, noting that the trial court in passing on a new trial motion may retroactively strike erroneously admitted evidence and then gauge the jury's performance as if the evidence were not before it. This procedure is not allowed in the directed verdict or j.n.o.v. context.³⁴³

e. Reopen Judgment

Under Rule 60(b) the district court may, on motion, order relief from a judgment or order on grounds ranging from mistake or excusa-

341. *Weyerhaeuser*, 430 F.2d at 423 (footnotes omitted). The trial judge may grant a new trial if in her opinion the verdict is against the clear weight of the evidence or will cause an injustice, even though substantial evidence prevents granting a j.n.o.v. *Id.*

342. *Id.* at 424 (footnote omitted). For another comparison of new trial motion with other motions, including directed verdict, involuntary dismissal, and summary judgment, see 5A J. MOORE & J. LUCAS, *supra* note 25, ¶ 50.03. Two cases which, like many appeals, also involve multiple trial motions are *Comfort Trane*, 592 F.2d 1373 (5th Cir. 1979), and *Spurlin v. General Motors Corp.*, 528 F.2d 612 (5th Cir. 1976).

343. See *Sumitomo Bank v. Products Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir. 1983). See also notes 146-47 and accompanying text.

ble neglect to fraud or general fairness.³⁴⁴ When a legal error is alleged the judge acts within his discretion.³⁴⁵ The circuit has also allowed discretion under Rule 60(b) to consider new evidence³⁴⁶ or to reinstate a dismissed complaint.³⁴⁷

D. Special Principles and Applications

1. Panel Stare Decisis

One application of the general rule of stare decisis, in which prior decisional law provides the governing "rule of law" in subsequent appeals,³⁴⁸ is the Eleventh Circuit principle of "panel stare decisis." Under this rule, each three-judge panel in the circuit is said to be "without power to overrule a decision of another panel. That task falls solely to the full Court sitting *en banc*."³⁴⁹ But subsequent panels can also reject precedent, even *en banc* precedent, under a superseding Supreme Court ruling or statutory change.³⁵⁰

A sticky dilemma is presented by conflicting panel cases, cases which theoretically should not develop if the panel stare decisis principle is maintained. In such a situation, later courts are caught in a jam:

344. FED. R. CIV. P. 60(b). Rule 60(a) governs clerical errors, Rule 59(e) provides for alteration or amendment of judgment within ten days, and Rule 52(b) allows amendment of findings, as is discussed in the Advisory Committee Notes, 1946 Amendment, to Rule 60(b).

345. See *Fackelman v. Bell*, 564 F.2d 734, 736 (5th Cir. 1977).

346. *Steelcase, Inc. v. Delwood Furniture Co.*, 578 F.2d 74, 77 (5th Cir.), *cert. denied*, 440 U.S. 960 (1978). The court left the motion to the trial judge's discretion but reviewed the implicit finding of due diligence supporting it for clear error. *Id.*

347. *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396 (5th Cir. 1981) (abuse of discretion).

348. *Cf. Edwards v. Sea-Land Serv., Inc.*, 720 F.2d 857, 859 (5th Cir. 1983) (discussing general rule that appellate court must apply decisional law in effect at the time it renders its subsequent opinion, plus exceptions that allow retroactive legal application).

A similar principle, the "law of the case" doctrine, makes controlling prior decisions in earlier appeals of the same line of litigation.

349. *Ford v. United States*, 618 F.2d 357, 361 (5th Cir. 1980). *Accord Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1192-93 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); *Davis v. Estelle*, 529 F.2d 437, 441 (5th Cir. 1976) (controls even where later panel perceives error in the precedent). This rule controls in the circuit, of course, until the *en banc* court rejects it.

350. See, e.g., *Davis*, 529 F.2d at 441.

"[W]e cannot pay heed to one line of precedent without disregarding the other, and we lack the authority to overrule one line at the other's expense."³⁵¹ In response, some judges will choose the "longer established and more extensive line of precedent,"³⁵² while others follow a relatively lonely case "because it is the first of our cases to consider the problem before us, has never been specifically overruled, and is in our view better-reasoned. . . ."³⁵³

In the final analysis, the latter factor—which precedent is right—probably controls over such apparently—malleable rules of thumb as "first case" or "latest case."³⁵⁴ Such conflicts are, of course, appropriate fodder for the en banc court, though panels seem to avoid that drastic course where one line of precedent is overwhelmingly applied or "correct," such that a conflict is in effect merely a couple of aberrational cases.

2. Review of Issues Not Raised

The courts have developed the general rule that appellants may not assert facts or theories on appeal which were not urged before the district court. In some cases the rule is applied strictly, since "[t]he time for sorting out theories begins long before the filing of a notice of appeal."³⁵⁵ The trial court "is not to be trapped" by the appellant's earlier tactical decision or abandonment.³⁵⁶ The rule may have its strictest application where the assertion first raised on appeal is factual or reflects a conscious waiver.³⁵⁷ In some cases, "additional facts would have been developed in the trial court had the new theory been presented there; in that case, judicial economy is served and prejudice

351. *Washington v. Watkins*, 655 F.2d 1346, 1354 n. 10 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982).

352. *Id.* at 1354 (footnote omitted).

353. *See United States v. Michelena-Orovio*, 702 F.2d 496, 501 (5th Cir.), *rev'd in part*, 719 F.2d 738 (1983)(en banc).

354. *See also Castillo*, 704 F.2d at 187 n.12 (citing "substantial line of authority" but also independently analyzing value of each position).

355. *Commercial Standard Ins. Co. v. Bryce Street Apts., Ltd.*, 703 F.2d 904, 908 (5th Cir. 1983). *See also Lumpkin v. Ricketts*, 551 F.2d 680 (5th Cir. 1977), *cert. denied*, 434 U.S. 957 (1978); *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974). But formal exceptions to the trial court's erroneous ruling or order are not necessary. *FED. R. CIV. P.* 46.

356. *DeBardeleben v. Cummings*, 453 F.2d 320, 325 (5th Cir. 1972).

357. *See id.* at 324-26. *See also Compass Insurance Co. v. Vanguard Insurance Co.*, 649 F.2d 331 (5th Cir. 1981).

is avoided by binding the parties to the facts presented and the theories argued below."³⁵⁸

Despite the strict warnings, however, many cases eventually go on to decide the new issue. The general rule is not jurisdictional but is "one left primarily to the discretion of the courts of appeals, to be exercised on the facts of the individual cases."³⁵⁹ A common exception is usually made where the newly raised issue concerns a pure question of law and a refusal to consider it would result in a miscarriage of justice.³⁶⁰ Other factors which make courts more willing to consider virgin issues include consent by the other party³⁶¹ and matters for which the proper resolution is beyond real doubt.³⁶²

Similar rules apply in other "waiver" situations. For example, it is said to be impermissible to raise an issue for the first time in a reply brief since the appellee then gets no chance to respond.³⁶³ The appellate court need not address issues which should have been raised by cross-appeal.³⁶⁴ Of course, it is likely that these "waivers" will themselves be waived by an appeals court finding it necessary to address an issue critical to the litigation or the decisional law. The appeals court generally has a "duty to apply the *correct* law."³⁶⁵

358. *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 768 n.10 (5th Cir. 1976).

359. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976), *quoted in* *Nilsen v. City of Moss Point*, 674 F.2d 379, 387 n.13 (5th Cir. 1982), *rev'd on other grounds*, 701 F.2d 556 (1983)(en banc). *See* *Thorton v. Schweiker*, 663 F.2d 1312, 1315 (5th Cir. 1981).

360. The language and situation is, of course, reminiscent of "plain error" principles applied in other settings. *See supra* text accompanying notes 187, 199, 277. But here an "injustice" justifies review *at all* rather than providing the "standard of review," level of deference, or amount of error that need be shown.

361. *Nilsen*, 674 F.2d at 387 n.13 ("absence of a strong argument from the appellee"). Another important factor is the full opportunity of each party to address the issue. *Id.*

362. *See Singleton*, 428 U.S. at 121.

363. *See* 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *FEDERAL PRACTICE AND PROCEDURE* § 3974, at 428 (1977). *Cf.* *Weingart v. Allen & O'Hara, Inc.*, 654 F.2d 1096, 1101 (5th Cir. 1981)(rule that appeals court will consider only errors of which appellant specifically complains is not inflexible).

364. It is often said that no cross-appeal is necessary to urge alternative theories in support of the lower court's judgment. *See French v. Estelle*, 692 F.2d 1021, 1024 n. 5 (5th Cir. 1982).

365. *Empire Life Ins. Co. v. Valdak Corp.*, 468 F.2d 330, 334 (5th Cir. 1972)(emphasis in original).

3. Harmless Error

Even where the district court or jury has made an error of law or fact in the situations discussed throughout this article, the Eleventh Circuit does not automatically reverse the lower decision. Rule 61 provides the general principle of “harmless error” applicable in civil actions:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.³⁶⁶

The circuit has framed this test for prejudice as a basic question: “We must determine whether, assuming the action under review to have been erroneous, was it really harmful to the complaining party?”³⁶⁷ The courts add as a corollary that if the result below is correct it must be affirmed, even though the district court relied on a wrong ground or gave a wrong reason.³⁶⁸ In applying these principles, then, every “standards of review” issue may also involve the question, either preliminary or ultimate, of whether any potential error would effect a substantial unfairness upon the parties.³⁶⁹

4. Habeas Appeals

Habeas corpus cases on appeal, though involving elements and is-

366. FED. R. CIV. P. 61. *See generally supra* note 187. *Cf. Herman v. Hess Oil*, 524 F.2d 767, 771 (3d Cir. 1975)(invited error).

367. *Tugwell v. A.F. Klaveness & Co.*, 320 F.2d 866, 868 (5th Cir. 1963), *cert. denied*, 376 U.S. 951 (1964).

368. *See, e.g., Securities & Exchange Comm’n v. Chenery Corp.*, 318 U.S. 80, 88 (1943); *Helvering v. Gowran*, 302 U.S. 238, 245 (1937).

369. Some errors are per se reversible, especially where constitutional issues or judicial prophylactic measures are concerned. *E.g., Rovinsky v. McKasle*, 722 F.2d 197, 201-02 (5th Cir. 1984)(denial of right to public trial warrants reversal even without prejudice). *See generally Harryman v. Estelle*, 616 F.2d 870 (5th Cir. 1980)(en banc).

sues of the criminal law, are of course structured as civil appeals, and the federal district judge acts as a fact finder or hearing-master as he would in the usual civil proceeding. The court's findings of fact, for example, are subject to the clear error test of Rule 52(a).³⁷⁰ The habeas case in the lower court also often involves referral to a magistrate for preliminary consideration.³⁷¹

Habeas appeals from district court review of state court convictions necessarily involve two levels of federal appellate review. In such a case the federal circuit court generally gives state court decisions and written findings a "presumption of correctness."³⁷² But the two levels may clash when the federal district court's fact findings are contrary to state court findings. Presumably appellate review giving a "presumption of correctness" is about equal to review for "clear error,"³⁷³ so that where district court differs from state court the tug of appellate presumptions is from opposite, but equally strong, directions. If the first level of deference—to state courts—is to have meaning, it appears that the "clear error" deference given the district court may have to give way some. That rationale may, of course, underlie the "glosses" on the clearly erroneous rule the former Fifth Circuit developed for cases built on documentary evidence,³⁷⁴ since habeas cases often run through the federal courts on paper.

The Supreme Court set out in *Jackson v. Virginia*³⁷⁵ the habeas standard for sufficiency of evidence. Allowing all reasonable inferences to be drawn in the government's favor,³⁷⁶ the appeals court must affirm if "any rational trier of fact could have found the essential elements of

370. See *supra* notes 23, 24, 31-44 and accompanying text. See generally *Watkins*, 655 F.2d at 1353 n.9 (discussing fact findings and characterizations for such situations as adequate representation, sufficiency of evidence, identification procedures, and multiple representation), *cert. denied*, 456 U.S. 949 (1982).

371. See *supra* note 28 and accompanying text.

372. 28 U.S.C. § 2254(d)(1982), *Marshall v. Longberger*, 459 U.S. 422 (1983); *Sumner v. Mata*, 449 U.S. 539 (1981). Findings on mixed fact-law questions generally do not benefit from the presumption. *E.g.*, *Cuyler v. Sullivan*, 446 U.S. 335, 341-42 (1980) (attorney did not engage in multiple representation). A state's interpretation of its own law controls. See *Skipper v. Wainwright*, 444 U.S. 974 (1979).

373. The early equity standard of "presumptively correct" was adopted for both law and equity in the rule 52(a) "clear error" standard. See *supra* text accompanying note 20. See also *Bose Corp. v. Consumers Union of the United States*, ___ U.S. ___, 104 S. Ct. 1949, 1959 (1984).

374. See *supra* notes 55-70 and accompanying text.

375. 443 U.S. 307 (1979).

376. See *Glasser v. United States*, 315 U.S. 60, 80 (1942).

the crime beyond a reasonable doubt."³⁷⁷ It could be argued that *Jackson* intended even less review discretion to the federal courts in state habeas cases than with the sufficiency test for direct appeals, or at least that even more deference *should* be given the states. But the appeals courts do not generally perceive such a distinction, often applying *Jackson* on direct appeals.³⁷⁸

III. Conclusion

Appellate courts seldom do their magic from an empty hat. The work of the lower courts—sometimes including state courts—or administrative agency frequently defines how the appeals judges look at the litigation and how far they can go in making law. What one court recently admonished is often true: "We take this occasion to repeat: we do not sit to hear cases de novo."³⁷⁹

But in the final analysis the appeals court's duty is to make a correct decision. In frequent situations the judges are ultimately given "plain error" review, which means that at a minimum they can reverse for a manifest miscarriage of justice. Thus, the Eleventh Circuit judge, regardless of the first-level standard of review, need not preside over a substantial injustice. In the long run, then, standards of review can be powerful case-defining and power-assigning tools, but they should not serve as a Dickens-like limit to the judges' sense of fairness. It has worked out that in practice the avoidance of a rank injustice is indeed a legitimate ultimate standard of review. At the same time, regardless of the substantive standard of review or the transparent nature of the lower court's error, the appellate court may not reverse unless the appellant's substantial rights are abridged.³⁸⁰ Judge Frank once noted the irony of the deference levels in the standards-of-review notion:

A wag might say that a verdict is entitled to high respect because the jurors are inexperienced in finding facts, an administrative finding is given high respect because the administrative officers are specialists (guided by experts) in finding a particular class of facts, but, paradoxically, a trial judge's finding has far less respect because he is blessed neither with jurors' inexperience nor adminis-

377. *Jackson*, 443 U.S. at 319.

378. See, e.g., *United States v. Shaw*, 701 F.2d 367 (5th Cir. 1983).

379. *Commercial Standard*, 703 F.2d at 908.

380. See *Meguire v. Corwine*, 101 U.S. 108, 110-12 (1879). See also *supra* notes 366-68 and accompanying text.

trative officers' expertness.³⁸¹

Of course, the courts have added to this straightforward observation with plenty of defining texts and minute categorization of special situations. But even at a high level, at any rate, it is a wise "wag," as practicing attorney, who keeps the various standards straight and uses them—along with any ambiguities and inconsistencies—to frame the issues in the client's best light. The wise court, too, will sort out the checkpoints and follow them, keeping in mind the final test in either direction for substantial fairness. Meanwhile, the profession as a whole, joined by legal commentators, may remember the ubiquitous nature of the standards of review and further the inquiry into their value and fairness, not just in each case, but upon the legal system as a whole.

381. *Orvis v. Higgins*, 180 F.2d 537, 540 n.7 (2d Cir.), *cert. denied*, 340 U.S. 810 (1950).

The Fourth Amendment and Surgical Searches: Invasion of the Bullet Snatchers

I. Introduction

At 1:30 a.m. on a summer evening, the proprietor of a market, while locking up his business, sees a man approach with a gun in his hand. The proprietor draws the gun he carries for protection. Shots are fired and both men are injured. Ambulances transport the two men to the hospital where the proprietor identifies his alleged assailant, and, later, police charge him with several felonies. The state attorney now wants the bullet which is lodged in the alleged felon's chest as evidence. Surgery using general anesthesia is required to obtain the bullet. Because the alleged felon refuses to undergo this surgical search, the state seeks a court order to compel his compliance.¹

The fourth amendment to the United States Constitution² protects a person from official intrusion into areas in which one has a reasonable expectation of privacy,³ absent a showing that the intrusion is reasonable.⁴ When the area to be searched is physical property, a dwelling or some other structure, the searcher demonstrates reasonableness by establishing probable cause⁵ to believe the object sought is in the place for which a search warrant is to be issued. Once probable cause is proven, the intrusion is deemed reasonable and the search warrant is issued.⁶

1. The facts described are similar to the facts of *Winston v. Lee*, discussed *infra*.

2. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. CONST. amend. IV.

3. See *Katz v. United States*, 389 U.S. 347 (1967).

4. L. WADDINGTON, *ARREST, SEARCH AND SEIZURE passim* (1974).

5. See, e.g., *Johnson v. United States*, 333 U.S. 10 (1948), stating that the determination of probable cause shall be decided "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Id.* at 14.

6. L. WADDINGTON, *supra* note 3, at 9.

When authorities seek to search an individual, the nature and extent of this intrusion also must not exceed the bounds of the fourth amendment's protection of an individual's privacy and dignity. The individual's privacy interest must be balanced against the state's interest in obtaining the evidence.⁷ However, a physical search of an individual's body has the potential of being much more intrusive than a premises search since an individual has a stronger expectation of privacy in the integrity of his body because of its obvious private nature. Since the expectation of privacy in the contents of one's body is greater than the expectation of privacy in, for example, the contents of one's dresser drawers, a mere showing that the evidence is present in the body is often, by itself, insufficient to meet the reasonableness requirement of the fourth amendment. Authorities must demonstrate a more compelling need for the search than the mere fact that the evidence is present in the person's body and that the state needs it. "The overriding function of the fourth amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."⁸

When the state desires to search the human body, an evaluation of the reasonableness of the official conduct begins with a determination of the characteristics of the intrusion;⁹ more specifically, whether the intrusion is an exterior or interior bodily intrusion.¹⁰ The evidence sought may be on the body's surface, in body cavities, or actually lodged inside the body.¹¹ Intrusions on the body's surface are exterior intrusions, and include as examples scrapings of fingernails and skin,¹² and clippings of hair.¹³ Exterior intrusions are traditionally considered reasonable because of the very limited nature of the intrusion. The state's need for the evidence outweighs the individual's privacy interest. Interior intrusions are classified as intrusions into the body and include the pinprick necessary for a blood alcohol test,¹⁴ stomach pumping,¹⁵

7. *Elkin v. United States*, 364 U.S. 206 (1960).

8. *Schmerber v. California*, 384 U.S. 757 (1966).

9. 2 W. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 4.1(d) (1978).

10. See generally Eckhardt, *Intrusion into the Body*, 52 MIL. L. REV. 141 (1971).

11. *Id.* at 141.

12. See, e.g., *Cupp v. Murphy*, 412 U.S. 291 (1973) (scraping of dried blood from under fingernails).

13. See, e.g., *In re Grand Jury Proceedings (Mills)*, 686 F.2d 135 (3d Cir. 1981), cert. denied, 103 S. Ct. 386 (1982) (hair samples from scalp and face).

14. See, e.g., *Schmerber*, 384 U.S. at 757.

and the most interior of intrusions, surgery.¹⁶ This note focuses on the last of these three intrusions: the surgical search.

States which have considered the question of surgical searches differ over the reasonableness of the search, and selectively apply different standards according to their own particular preferences.¹⁷ Because of the highly invasive nature of surgical searches, a special set of standards is necessary to determine when such a procedure is a permissible intrusion and, therefore, a reasonable search for fourth amendment purposes.

Arguably, the standards utilized to determine the fourth amendment reasonableness of a surgical search, until now, have been necessarily fair and just standards and have provided a flexible, case-by-case framework for the resolution of this issue. This note, however, advocates the adoption of a bright-line standard, which modern medical technology requires, to prevent the potential for serious abuse and the threatened further erosion of the protections afforded an individual by

15. See, e.g., *Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966).

16. See, e.g., *Crowder v. United States*, 543 F.2d 312 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

17. At present, most jurisdictions follow the reasonableness standard set forth in *Schmerber* in determining whether a surgical intrusion passes constitutional muster. These jurisdictions, however, while adopting the general *Schmerber* approach, may vary as far as determining the weight to be given to various factors used in balancing the interests at stake. Some stress location of the evidence in the body as definitive. Others stress a major/minor surgery distinction. Most jurisdictions take into account time required for surgery, use of general anesthesia, whether the surgical candidate is the defendant or a victim/witness, and the presence or absence of consent. See, e.g., *State v. Allen*, 277 S.C. 595, 291 S.E.2d 459 (1982); *State v. Maring*, 404 So. 2d 960 (1981); *People v. Scott*, 21 Cal. 3d 284, 578 P.2d 123, 145 Cal. Rptr. 876 (1978); and *Creamer v. State*, 229 Ga. 511, 192 S.E.2d 350 (1972).

In *Adams v. State*, 260 Ind. 663, 299 N.E.2d 834 (1973), *cert. denied*, 415 U.S. 935 (1974), the Indiana Supreme Court held all surgical intrusions per se unconstitutional under the fourth amendment. While the Supreme Court of Georgia also seemed to endorse a per se rule, the surgical candidate involved was a witness to the crime and not the defendant. *State v. Haynie*, 240 Ga. 866, 242 S.E.2d 713 (1978). Therefore, it remains unresolved as to whether that court meant to adopt a per se rule in all surgical intrusion cases, or only in those involving surgical searches of people other than the defendant.

Also, in *Lee v. Winston*, 717 F.2d 888 (4th Cir. 1983), *aff'd*, *Winston v. Lee*, 53 U.S.L.W. 4367 (March 20, 1985)(No. 83-1334), petitioners suggested that the respondent wished the United States Supreme Court to apply a per se rule in that case. See Brief for Petitioners at 9, *Lee v. Winston*, 717 F.2d 888 (4th Cir. 1983), *aff'd*, *Winston v. Lee*, No. 83-1334 (U.S. March 20, 1985).

the fourth amendment. The previously employed case-by-case analysis should be retained only in those few cases not encompassed by the bright-line standard. Declaring all surgical searches requiring the use of general anesthesia as unconstitutional per se is the appropriate bright-line standard.

II. The Traditional Bounds of Permissible and Impermissible Bodily Intrusions: *Rochin v. California*¹⁸ and *Schmerber v. California*¹⁹

Over the years, the United States Supreme Court began to delineate the boundaries of what constituted a reasonable search for constitutional purposes. *Rochin v. California* and *Schmerber v. California* became the endpoints for what was and was not permissible official conduct regarding searches of the human body.

Rochin laid the foundation for what constituted impermissible conduct. In *Rochin*, after gaining illegal entry to Rochin's home and bedroom on information that Rochin was selling drugs, police officers noticed two capsules on his bedside table.²⁰ Rochin quickly grabbed the pills and shoved them into his mouth²¹ in an effort to prevent the police from obtaining them as evidence against him. A violent struggle ensued as the officers attempted to pry open the defendant's mouth to retrieve the capsules. The attempt failed and Rochin swallowed the pills. The officers then handcuffed Rochin, rushed him to a hospital, and ordered a doctor, despite Rochin's resistance, to place a tube down the defendant's throat and pump an emetic solution down the tube into Rochin's stomach.²² The emetic caused vomiting. The two capsules retrieved from the vomitus were tested and found to contain morphine.²³

The trial court admitted the capsules into evidence despite Rochin's objection that the capsules were obtained in such an unorthodox manner. The pills were admitted into evidence even though the unorthodox means of obtaining them was frankly set forth in the testimony.²⁴ The Appellate Court affirmed the conviction and the Califor-

18. 342 U.S. 165 (1952).

19. 384 U.S. 757 (1966).

20. *Rochin*, 342 U.S. at 166.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

nia Supreme Court, without opinion, denied Rochin's petition for a hearing.²⁵

The United States Supreme Court reversed Rochin's conviction. Interestingly, however, the Supreme Court did not base the reversal on fourth amendment grounds,²⁶ but on the grounds that the method of obtaining the capsule from Rochin's stomach violated the due process clause of the fourteenth amendment.²⁷ The Court found that the official conduct was so egregious as to make Rochin's trial fundamentally unfair. "This is conduct which shocks the conscience."²⁸ This course of conduct is "bound to offend even hardened sensibilities."²⁹ The method utilized was "too close to the rack and the screw to permit of constitutional differentiation."³⁰ *Rochin* established the first standard. Conduct which shocked the conscience, offended a sense of justice, and which ran "counter to the 'decencies of civilized conduct'"³¹ became unreasonable per se and, therefore, in violation of due process. *Rochin* represents conduct impermissible because it violates due process/fundamental fairness standards. *Rochin's* prohibition, however, applies only to the most extreme and outrageous conduct.³²

At the other end of the spectrum of reasonableness is *Schmerber*, where the United States Supreme Court set the standard for what is permissible official conduct under the fourth amendment. *Schmerber* was involved in an automobile accident. While *Schmerber* received

25. *Id.* at 166, 167.

26. The Court did not consider whether this conduct would constitute an unreasonable search under the fourth amendment because this case was decided prior to *Mapp v. Ohio*, 367 U.S. 643 (1961), which applied the exclusionary rule of *Weeks v. U.S.*, 232 U.S. 383 (1914) to the states.

27. *Rochin*, 342 U.S. at 168. The Due Process Clause provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV.

28. *Rochin*, 342 U.S. at 172.

29. *Id.*

30. *Id.*

31. *Id.* at 175.

32. It is clear that the *Rochin* Court objected to the entire line of official conduct, and did not feel that it was the stomach pumping alone that was particularly offensive. In fact, subsequent stomach pumping cases have been held to be reasonable searches. See, e.g., *Blefare*, 362 F.2d at 870. The court distinguished this case from *Rochin* on the fact that the search was a border search, where the state's interest in obtaining the evidence is very high, and on the fact that the method used to administer the emetic was not by forced pumping, as in *Rochin*, but was by a drip method often used on children. See generally Note, *Constitutionality of Stomach Searches*, 10 U.S.F.L. REV. 93 (1975).

treatment in a hospital for injuries sustained in the accident, police officers directed the attending physician to withdraw a blood sample from Schmerber.³³ The doctor withdrew the blood and a chemical analysis indicated Schmerber was intoxicated.³⁴ The blood analysis results were admitted into evidence at trial over Schmerber's objection.³⁵ Schmerber was convicted of driving under the influence and appealed his non-jury conviction on four grounds. He claimed the introduction into evidence of the blood alcohol test results: 1) denied him due process of law under the fourteenth amendment;³⁶ 2) violated his privilege against self-incrimination under the fifth amendment;³⁷ 3) violated his right to counsel under the sixth amendment;³⁸ and 4) violated his right

33. *Schmerber*, 384 U.S. at 758 (1966).

34. *Id.* at 759.

35. *Id.* At trial, defendant's objection was based on the ground that the blood had been withdrawn in spite of his refusal to consent to the test on the advice of his counsel. The defendant felt this non-consensual conduct violated his right to due process of law under the fourteenth amendment. The Appellate Department of the California Superior Court rejected this argument, as did the United States Supreme Court on certiorari. *See Schmerber*, 384 U.S. at 759.

Quoting Justice Warren's dissent in *Breithaupt v. Abram*, 352 U.S. 432, 441 (1957), the *Schmerber* Court noted that it made no "difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest." *Schmerber*, 384 U.S. at 759. The defendant in *Breithaupt* was unconscious at the time the blood was withdrawn, and argued a due process violation based on his inability to object to the procedure. The Court rejected *Breithaupt's* due process argument on the precedent of *Rochin*, stating that such withdrawal of blood did not offend a sense of justice, in that it did not rise to the level of the objectionable official conduct outlined in the *Rochin* case. *See supra* note 30 and accompanying text.

In *Schmerber*, the Court rejected Schmerber's due process argument based on *Breithaupt* and *Rochin*. The Court held the official conduct was simply not offensive enough to be prohibited on the grounds found violative of due process standards in *Rochin*. *See Schmerber*, 384 U.S. at 760.

36. *Schmerber*, 384 U.S. at 759.

37. *Id.* The Court held that the defendant's fifth amendment rights had not been violated since that amendment had never been interpreted broadly enough to cover this conduct. The fifth amendment privilege extends only to testimonial or communicative evidence. Since a blood test is not within these categories, fifth amendment rights do not attach, and the Court rejected this ground for appeal. *But cf.* *United States v. Dionisio*, 410 U.S. 1, 36-37 (1973) (Marshall, J. dissenting) stating that fifth amendment rights should attach beyond testimonial and communicative evidence to protect the introduction of any evidence that the government needs a defendant's cooperation to obtain.

38. *Schmerber*, 384 U.S. at 765-66. The argument that the defendant had been denied a right to counsel was also rejected by the Court. Sixth amendment rights do

not to be subjected to unreasonable searches and seizures under the fourth amendment.³⁹

The Court held that the blood test procedure involved in this case did not constitute an unreasonable fourth amendment search.⁴⁰ The Court characterized the pinprick necessary for a blood test as a minor intrusion which the Court considered permissible when performed under stringently limited conditions such as those present in the facts of that case.⁴¹ Although the Court limited the holding to the facts of the case, *Schmerber*, nonetheless, sets forth the factors it considers vital to an analysis of whether a particular intrusion beneath the body's surface is a reasonable search for fourth amendment purposes.

First, the *Schmerber* majority believes "[t]he interests in human dignity and privacy which the fourth amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained."⁴² Thus, the threshold determination when authorities seek an unconsented surgical search is whether there is a clear indication beyond mere chance that the evidence sought will be found.⁴³ This clear-indication standard is another way of expressing the elements of probable cause.⁴⁴ Rather than expressing the traditional elements of probable cause, the Court used the term "clear indication" because it wanted to stress that the same facts used to meet probable cause for the arrest should not automatically support an intrusive search of the body.⁴⁵ In *Schmerber's* case, for example, this clear indication was met based on the smell of his breath and the general indication of intoxication from his physical appearance. These facts were not the same facts used to establish probable cause for his initial arrest. Once this clear indication

not attach until the initiation of adversarial judicial proceedings. See *Kirby v. Illinois*, 406 U.S. 682 (1972) defining the scope of the "critical stage of the prosecution," which was held as the time when sixth amendment rights attached in *United States v. Wade*, 388 U.S. 218 (1967).

The majority held that sixth amendment rights had not attached at the time *Schmerber's* blood was taken, since adversarial judicial proceedings had not as yet been initiated. Therefore, since the defendant "was not entitled to assert the privilege, he has no greater right because counsel erroneously advised him that he could assert it." *Schmerber*, 384 U.S. at 766.

39. *Schmerber*, 384 U.S. at 759.

40. *Id.* at 772.

41. *Id.*

42. *Id.* at 769-70.

43. *Id.*

44. Eckhardt, *supra* note 9, at 150.

45. *Id.*

was present, the circumstances of the search should be examined to determine if it is fourth-amendment reasonable.

The Court outlined the factors it believed determinative of the reasonableness of a search. These factors include: 1) whether the procedure itself is reasonable, considering the extent of the procedure, and taking into account the effectiveness and widespread use, if any, of the procedure; 2) whether the performance of the procedure is done in a reasonable manner; e.g., whether it is done by a physician in a hospital environment according to accepted medical practices; and 3) whether there is a virtual absence of risk, trauma, or pain for most persons.⁴⁶ After setting forth these factors, the *Schmerber* Court emphasized that its holding was limited to minor bodily intrusions under these stringently limited conditions and gave no indication that it would permit "more substantial intrusions, or intrusions under other conditions."⁴⁷ The blood test in *Schmerber* represents the least-invasive interior bodily intrusion, and the Court's decision sets forth the factors determinative of permissible fourth amendment conduct.⁴⁸

Therefore, utilizing *Rochin's* standards for impermissible official conduct at one end, and *Schmerber's* standards for permissible official conduct at the other, one could logically envision these cases on a line continuum of search behavior.⁴⁹ At the far right end of the line is *Rochin*. At the far left of the line is *Schmerber*. Somewhere in the middle of the line is conduct which violates the fourth amendment as an unreasonable search. All conduct so outrageous, by *Rochin* standards, that it is violative of due process, would also be violative of the fourth amendment. All conduct conforming to *Schmerber* standards would not be violative of either due process or the fourth amendment, because it is considered a minor intrusion justified by necessity and is therefore reasonable. In the middle of this behavior continuum is con-

46. *Schmerber*, 384 U.S. at 771.

47. *Id.* at 772.

48. Since *Schmerber*, blood alcohol tests are generally considered reasonable searches under the fourth-amendment analysis. Therefore, several states have passed statutes to provide more protection from bodily intrusions for blood samples. These so-called implied consent statutes allow the police to take blood only upon the driver's consent. Refusal to consent, however, will generally result in suspension of one's driver's license. For a discussion of the constitutional and statutory issues involving implied consent, exemplified by Florida's implied consent statute, see Dobson, *Florida's New "Drunk Driving" Laws: An Overview of Constitutional and Statutory Problems*, 7 NOVA L.J. 179 (1983).

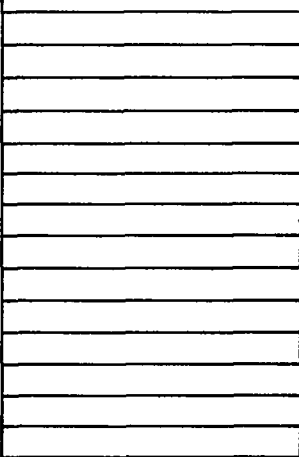
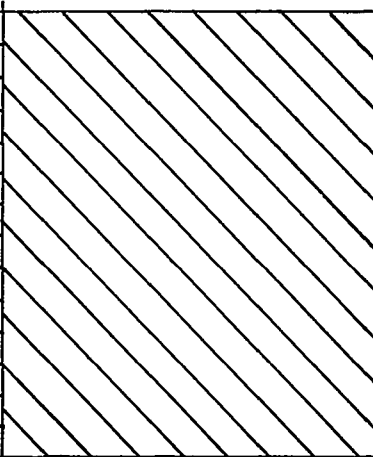
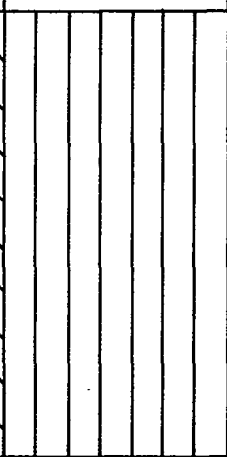
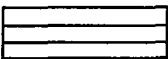


duct which is more intrusive than that at issue in *Schmerber* and which violates the fourth amendment, but yet does not rise to the level of a *Rochin* due process, fundamental fairness violation.

The conduct with which this note is concerned falls in the middle of this continuum and concerns the most intrusive of bodily searches: surgical searches. Most surgical searches arise when the state desires to retrieve bullets from a criminal suspect's body which the state needs to use as evidence against him.

III. The Bullet Cases

Courts which have considered cases questioning the permissibility of court-ordered surgical searches for bullets have held such procedures constitutionally permissible when justified under the circumstances and when performed in the proper manner.⁵⁰ Extending the factors set forth

49.

Schmerber	Surgical Searches	Rochin
		
	conduct violating neither the fourth amendment nor due process	
	conduct violating the fourth amendment but not violative of due process	
	conduct violating the fourth amendment and due process	

50. See, e.g., *Allison v. State*, 129 Ga. App. 364, 199 S.E.2d 587 (1973), *cert. denied*, 414 U.S. 1145 (1974); *Bowden v. State*, 256 Ark. 820, 510 S.W.2d 879 (1974); *United States v. Crowder*, 543 F.2d 312 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1062

by the foundation cases of *Rochin* and *Schmerber*, these courts have considered three categories of criteria in determining the reasonableness of surgical searches for bullets.

The first inquiry is forthright and usually easy to satisfy: whether the evidence is relevant and "could have been obtained in no other way, and whether there was probable cause to believe that the operation would produce it."⁵¹ This consideration, set forth in *United States v. Crowder*,⁵² is similar to the *Schmerber* requirement that there be a clear indication the evidence sought will be found.⁵³ If this threshold inquiry is not met, the fourth amendment analysis terminates. For if the evidence is not relevant, or there is no probable cause to believe it even exists, then the search for it would be unreasonable under the fourth amendment since the fourth amendment was designed specifically with the intention of preventing all general searches based on official curiosity alone.⁵⁴

The one problem which may arise in this threshold-inquiry area is that the bullet may have become unidentifiable due to deterioration while in contact with bodily fluids. If deterioration occurs, then the bullet may not be used as evidence since identification of the caliber and, thus, the source of the bullet is unreliable.⁵⁵ Therefore, "[g]iven the possibility that the bullet will be unidentifiable, it is not *certain* that evidence will be found."⁵⁶ While the court in *Lee v. Winston*⁵⁷ raised the question, it simply stated that it was satisfied that in that case there was a clear indication that evidence would be found, but did not elaborate on its reasons for that satisfaction. In most cases, however, this first inquiry can easily be addressed and resolved. For example, often x-rays can determine with great accuracy whether the evidence certainly exists and in what condition it is.

The second important inquiry in surgical-search bullet cases concerns the location of the bullet. Location is not restricted to where the bullet is located in the body; for example, the head, arm, leg, or chest.

(1977); *State v. Allen*, 277 S.C. 595, 291 S.E.2d 459 (1982).

51. *Crowder*, 543 F.2d at 316.

52. *Id.* at 312.

53. *Schmerber*, 384 U.S. at 770.

54. See generally L. WADDINGTON, *supra* note 3.

55. *Winston v. Lee*, 551 F. Supp. 247, 252 (E.D. Va. 1982). See also *Lee*, 717 F.2d at 888. An analysis of the length of time necessary for bullet deterioration and its attendant questions is beyond the scope of this article.

56. *Lee*, 551 F. Supp. at 252 (emphasis in original).

57. *Id.* at 247.

The location inquiry determines how deeply within the area the bullet rests and how near other structures, for example, nerves, organs, or blood vessels, the bullet may lie.⁵⁸ The position of the bullet within the body often helps the court to categorize the surgery as either major or minor, based on medical testimony.⁵⁹

The third inquiry, which overlaps somewhat with the major/minor surgery determination, concerns the procedure necessary to remove the bullet. The courts elaborate upon the basic guidelines of *Schmerber*. In addition to the guideline as to whether the surgery is performed "by a physician in a hospital environment according to accepted medical practices,"⁶⁰ courts consider the time needed to perform the surgery,⁶¹ possible danger to the defendant's life or limb,⁶² and the major surgery versus minor surgery distinction.⁶³ Inquiry includes whether a general

58. See, e.g., *Crowder*, 543 F.2d at 312 (surgical removal of bullet in defendant's arm reasonable; from defendant's leg, unreasonable); *Allen*, 277 S.C. at 595, 291 S.E.2d at 459 (surgical removal of bullet in defendant Allen's left chest, less than one-quarter inch below the skin is reasonable; surgical removal of bullet in defendant Childer's left thoracic "gutter" unreasonable). See also *State v. Richards*, 585 S.W.2d 505 (Mo. App. 1979) (surgery reasonable to obtain bullet four inches below skin since there were no vital organs in that area). But see *Bowden*, 256 Ark. at 820, 510 S.W.2d at 879 (surgical removal of bullet from defendant's spinal canal unreasonable); *State v. Overstreet*, 551 S.W.2d 621 (1977)(surgical removal of bullet from buttocks reasonable).

59. See *Crowder*, 543 F.2d at 312; *Allen*, 277 S.C. at 595, 291 S.E.2d at 459; *Richards*, 585 S.W.2d at 505; *Bowden*, 256 Ark. at 820, 510 S.W.2d at 879; *Overstreet*, 551 S.W.2d at 621.

60. *Schmerber*, 384 U.S. at 771.

61. See, e.g., *Allen*, 277 S.C. at 595, 291 S.E.2d at 459 (15 minutes indicative of minor intrusion and thus reasonable); *Creamer*, 229 Ga. at 511, 192 S.E.2d at 350 (reasonable if surgery under local anesthesia and did not exceed 15 minutes).

62. See, e.g., *Bowden*, 256 Ark. at 822, 510 S.W.2d at 881. There was medical testimony that fatal risk was involved with surgery. While doctors recommended removal of the bullet for purposes of defendant's health, the court did not sanction removal of the bullet as evidence since the risk of fatality from the procedure would make the search unreasonable. The court did not address whether the bullet, obtained by surgery for the defendant's health, could then be obtained from the doctors for use as evidence at trial. See also *Allen*, 277 S.C. at 595, 291 S.E.2d at 459, 464. Even though the court held Allen's surgery to be reasonable and thus ordered it to be performed, the order also provided that if at any time during surgery "danger to the life of Larry Ford Allen develops such removal procedures shall cease and such steps shall be taken as may be necessary to protect the health and life of Larry Ford Allen." *Id.*

63. See, e.g., *Crowder*, 543 F.2d at 312 (operation minor and therefore reasonable); *Bowden*, 256 Ark. at 820, 510 S.W.2d at 879 (major surgical intrusion into spinal canal unreasonable).

anesthesia or a local anesthesia is necessary.⁶⁴ The three considerations of certainty the evidence will be found, bullet location, and where the surgery must be performed, taken together, arguably comprise a totality of the circumstances approach to this fourth amendment analysis. Using this totality of the circumstances approach on a case-by-case basis, and balancing all the factors affecting an individual's privacy interests in his own body, all courts considering surgical searches for bullets have found these searches reasonable in all cases where the proposed surgery falls within the "ambit of *Schmerber*"⁶⁵ and within the factors developed by "subsequent bullet-removal cases from other jurisdictions."⁶⁶ Most courts hold that "[t]he human body is not, of course, a sanctuary in which evidence may be concealed with impunity. . . . Appropriate procedures to retrieve such evidence are neither 'unreasonable' per se under the fourth amendment, nor violations of 'due process' procedures guaranteed by the fifth and fourteenth amendments."⁶⁷

In fact, only one court holds such surgical searches per se unconstitutional.⁶⁸ The defendant in *Adams v. State*⁶⁹ sought to preclude the surgical removal of bullet fragments from his buttocks. Despite the fact that the surgery could be accomplished under local anesthesia, the Indiana Supreme Court held, on the authority of *Rochin*, that any such bodily intrusion constitutes a fourth amendment violation per se.⁷⁰ Arguably, however, the Court's reliance on *Rochin* is misplaced. It was not the stomach pumping intrusion alone which violated *Rochin*'s rights, but the totality of the official misconduct. *Rochin* involved an illegal entry of the home and an abusive struggle to open *Rochin*'s mouth in addition to the "forcible extraction of his stomach's

64. See, e.g., *Lee*, 551 F. Supp. at 247. The district court ordered surgery as reasonable since it could be accomplished with local anesthesia. While the defendant was being x-rayed in preparation for surgery, the location of the bullet was determined to be deeper within the defendant's chest wall, thus necessitating the use of general anesthesia. When presented with this new evidence, the court in a supplemental opinion rescinded its order of surgery based on its belief that the changed circumstances necessitating the use of general anesthesia now made the surgery unreasonable under the fourth amendment. See also *Lee*, 717 F.2d at 888.

65. *Allen*, 277 S.C. at 595, 291 S.E.2d at 463.

66. *Id.*

67. *People v. Scott*, 21 Cal.3d 284, 293, 578 P.2d 123, 127, 145 Cal. Rptr. 876, 880 (1978).

68. See *Adams*, 260 Ind. at 663, 299 N.E.2d at 834. See also *supra* note 16.

69. *Id.*

70. *Adams*, 260 Ind. at 663, 299 N.E.2d at 834.

contents.”⁷¹

An argument suggests ⁷² the *Adams* Court’s reliance on *Rochin* was also misplaced based on the fact that *Rochin* was a due process case and not a fourth amendment case.⁷³ However, since both due process and fourth amendment analyses are used to measure official conduct, it is perfectly proper to invoke the *Rochin* standard when, as in *Adams*, the Court is examining search behavior. The Indiana Supreme Court is the only court in the nation to adopt a per se rule of unconstitutionality regarding surgical searches. An argument rightly asserts that, even assuming the *Adams* holding is valid, “this single case hardly constitutes a ‘line’ of authority.”⁷⁴ Arguably, however, it is not a *line* of authority that is needed in order for a per se rule to be a viable tool in determining the reasonableness of search conduct. What is needed, instead, is a *correct* authority. As set forth above, it appears that reliance on *Rochin* under the *Adams* facts is misplaced and that *Adams* is not the correct authority that is needed. But this is not, as petitioners suggest, because *Rochin* was decided on due process grounds and *Adams* is a fourth amendment case, but instead because the *Adams* Court misapprehended the reason for the due process violation. Due process was not violated on the search intrusion alone, but by the totality of the misconduct engaged in by the *Rochin* officers. Therefore, holding the *Adams* search *alone* per se violative of due process, without more, is not a proper conclusion to be drawn from the facts of *Rochin*. The holding of *Adams* appears to be aberrant and not a conclusive test of this issue by any means.

It is, therefore, apparent that the analysis presently utilized to determine the fourth-amendment reasonableness of surgical searches for bullets consists of a case-by-case, totality-of-the-circumstances approach. In applying this approach, the courts rely on a consideration of the factors developed by *Schmerber* and elaborated upon by the subsequent bullet removal cases.

IV. *Winston v. Lee*: The Fourth Amendment’s Protective Door Left Ajar

With improved medical technology, the validity and usefulness of

71. *Rochin*, 342 U.S. at 172.

72. *Lee v. Winston*, 717 F.2d at 888.

73. Brief for Petitioners at 10-11, *Lee*, 717 F.2d at 888.

74. Brief for Respondents at 15, *Lee*, 717 F.2d at 888.

these traditional standards as a means of measuring constitutionally reasonable conduct for fourth amendment purposes has come into question. The most recent surgical search case to be decided by the United States Supreme Court in the light of the above factors is *Winston v. Lee*.⁷⁵ The Court heard oral argument,⁷⁶ and recently rendered an opinion that court ordered surgical removal of the bullet imbedded in Mr. Lee's chest would violate the fourth amendment's prohibition against unreasonable searches and seizures.⁷⁷ By so holding, the Court halted the attack on Mr. Lee's fourth amendment protection against an unreasonable search. However, by failing to adopt a bright-line standard, the Court, though well intentioned, has left future defendants' fourth amendment protections vulnerable.

A proprietor of a market shot defendant Lee in the left side of the chest when he saw Lee approach with a gun in his hand.⁷⁸ Lee shot the proprietor in the leg. The two men were transported separately to the hospital for treatment, where the proprietor identified Lee as the man who shot him.⁷⁹

Lee was charged with four felony counts and the Commonwealth attorney for the City of Richmond filed a motion to compel the surgical removal of the bullet from Lee's chest. Lee refused to undergo the surgery voluntarily.⁸⁰ Hearings to determine the reasonableness of the proposed court ordered surgery were held in the state circuit court. Based on testimony that the bullet was 0.5 centimeters below the skin, that local anesthesia could be used, and that there was little risk of harm or injury to the defendant, the court found this surgery reasonable, but stayed the performance of the surgery pending appellate review of the order.⁸¹ Lee filed a petition for writ of habeas corpus and a writ of prohibition with the Supreme Court of Virginia, which summarily denied the writs.⁸² After exhausting his state remedies, Lee petitioned the United States District Court for the Eastern District of Virginia for habeas corpus relief. The defendant again raised the issue that compelling this surgery would violate his rights under the fourth amend-

75. 53 U.S.L.W. 4367 (March 20, 1985)(No. 83-1334).

76. The United States Supreme Court heard oral arguments on October 31, 1984.

77. *Winston*, 53 U.S.L.W. 4367 (March 20, 1985)(No. 83-1334).

78. *Lee*, 717 F.2d at 890.

79. *Id.*

80. *Id.*

81. *Id.* at 890-91.

82. *Id.* at 891.

ment.⁸³ After hearing evidence of the shallow bullet location and the virtual lack of risk to the defendant under local anesthesia, the district court authorized the surgery to proceed.⁸⁴

Pre-surgical x-rays, however, indicated the bullet was in a deeper position in the chest wall than originally believed. The bullet was approximately 2.5 to 3.0 centimeters below the skin's surface.⁸⁵ With this new information, Lee petitioned for rehearing due to changed circumstances. Medical testimony indicated, in addition to the newly established depth of the bullet, that the bullet was imbedded in muscle tissue and that the more extensive surgery necessary to remove the bullet would require general anesthesia.⁸⁶ In a supplemental opinion, the district court, after reviewing this evidence in the light of *Rochin*, *Schmerber*, and their progeny, rescinded its order of surgery and permanently enjoined the procedure.⁸⁷ The court held that this procedure went "far beyond the prick of a needle in *Schmerber*, the slight intrusion in *Crowder*, and the minor procedure originally supposed to be required in this matter."⁸⁸ The district court did not identify any single element of the proposed procedure as the linchpin of its determination that this intrusion would be unreasonable, but said that "the fact that general anesthesia is involved is very important to the Court's [sic] conclusion that the procedure shocks the conscience."⁸⁹ In emphasizing that such a procedure as the surgery contemplated here could not be said to involve "virtually no . . . trauma"⁹⁰ by *Schmerber* standards, the court stated that it was "appalled at the prospect of government authorities rendering a person unconscious, cutting him open, and probing around inside his body for evidence which might, or indeed might not, aid them in convicting him of a crime."⁹¹

The state appealed this reversal to the Fourth Circuit Court of Appeals⁹² which affirmed the district court's holding that surgery would violate Lee's fourth amendment protection against unreasonable

83. *Id.*

84. *Lee*, 551 F. Supp. at 247.

85. *Id.* at 259.

86. *Id.*

87. *Id.* at 261.

88. *Id.*

89. *Id.*

90. *Id.* (quoting *Schmerber*, 384 U.S. at 771).

91. *Id.* at 261.

92. *Lee*, 717 F.2d at 888.

searches.⁹³ The Fourth Circuit, stating that "fourth amendment questions are peculiarly fact-specific,"⁹⁴ indicated that there was a sufficient body of case law on the specific facts peculiar to bullet removal from which the court could draw guidance as to a general principle.⁹⁵ The Fourth Circuit believed that the general principle to be utilized was that once the state has shown the evidence is relevant and can be obtained in no other way, "the reasonableness of removing it forcibly from a person's body is judged by the extent of the surgical intrusion and the extent of the risks to the subject."⁹⁶ In adopting this principle, the Fourth Circuit utilized the test applied in the majority of surgical search cases; arguably the totality of the circumstances approach. Since this surgery was not medically necessary to the patient's health, and involved general anesthesia and a more invasive procedure than originally thought, Lee's risk of pain, trauma, and injury, was increased. Therefore, the Fourth Circuit held it was not surgically reasonable and, therefore, not constitutionally reasonable.

On certiorari to the United States Supreme Court,⁹⁷ the petitioners in *Winston v. Lee* argued that the proposed surgery was constitutionally reasonable. Petitioners state that it is "very common in the 1980's to place patients under general anesthesia."⁹⁸ Citing the increasing incidence of outpatient surgical procedures using general anesthesia, petitioners suggested that surgery under general anesthesia has risen to the routine-procedure status of the *Schmerber* blood alcohol test. Stressing the *doctor's* preference that an uncooperative surgical candidate be rendered unconscious through general anesthesia,⁹⁹ the state analogized the substantial risk of this major surgical procedure to, what they termed, the substantial risk involved in "waking up, getting dressed and eating breakfast in the morning."¹⁰⁰ It can be inferred from this argument that the state believed the district court's concern over the forced use of general anesthesia to render a person unconscious, cut him open, and probe around in his body was an antiquated concern, no longer reasonable in the enlightened technology of 1984. "In the 20th century, with the modern medical advances that have

93. *Id.* at 901.

94. *Id.* at 899.

95. *Id.*

96. *Id.*

97. Writ of certiorari was granted April 16, 1984.

98. *Supra* note 70, at 16.

99. *Id.* at 16, 17.

100. *Id.* at 17.

been made, this surgery is not unreasonable at all."¹⁰¹

The respondent referred to petitioners' "marvels of modern science"¹⁰² as "claims made without reference to the record or to any legal, medical, or scientific literature."¹⁰³ Referring to the dissent rendered in the court below, the respondent characterized this surgical search as an assault on the body and dignity of Mr. Lee,¹⁰⁴ and urged the Court not to be the first to authorize a surgical search which would require general anesthesia.¹⁰⁵

The record of *Winston* indicates that it would be difficult to satisfy even the threshold inquiry utilized by several previous surgical search cases involving bullets; i.e., whether the evidence is relevant, and "could have been obtained in no other way."¹⁰⁶ Lee did not share the district court's conviction that there was a clear indication the evidence would be found,¹⁰⁷ nor that it would then meet the relevance test. In addition to a concern that the bullet might be unidentifiable because of the effect of bodily fluids upon it, Lee was concerned that there was a probability the specimen would be useless, because there would be nothing to compare it with,¹⁰⁸ since the proprietor's gun would not be capable of refirings.¹⁰⁹ If proven true, these facts suggest the bullet would not be admissible as relevant evidence even if obtained.

Even assuming the bullet is identifiable, and therefore relevant evidence, Lee asserted this evidence could be obtained and demonstrated by the use of x-rays and medical testimony, and that he could be identified through the testimony of the proprietor of the market. This argument by Lee seems to negate compliance with the requirement that the evidence could be obtained in no other way. Since a showing of the evidence's relevance, in addition to a showing that the evidence can be obtained in no other way, is a threshold requirement which must be met before further analysis of the factors concerning bullet location and surgical procedure is undertaken, it appears that this surgical search would not be considered a reasonable one under the precedents

101. See Reaves, *Bullet Battle*, A.B.A.J., Jan. 1984, at 28 (quoting petitioners' attorney Stacy Garrett).

102. *Supra* note 71, at 6.

103. *Id.*

104. *Id.* at 7.

105. *Id.*

106. *Crowder*, 543 F.2d at 316.

107. See *supra* note 53.

108. *Supra* note 71, at 7.

109. *Id.*

of fourth amendment case law.

Even assuming, arguendo, the desired *Winston* surgical search met the first inquiry, the location of the bullet imbedded in the muscle tissue, and the extent of the procedure necessitating the use of general anesthesia, in themselves, fall outside previous parameters of reasonable surgical searches. For the Supreme Court to hold this surgery reasonable would have necessitated a radical extension of the standards set forth in prior case law, opening the door to a new era resulting in the further erosion of rights protected by the fourth amendment. Thus, the Supreme Court's holding is sound in Mr. Lee's case, but the danger to others' fourth amendment rights continues. Justices Blackmun and Rehnquist concurred in the judgment only.¹¹⁰ From this, it can be reasonably inferred that at least two members of the Court feel the majority's opinion is lacking a complete resolution, even though the correct result was reached.

Arguably, the Court applied a 1966 *Schmerber* balancing approach¹¹¹ to a 1985 Orwellian case. The danger in using *Schmerber* lies in the unaddressed possibilities of the future. The pending question after *Winston* is whether any surgical search requiring general anesthesia will be fourth-amendment reasonable as soon as some state convinces the Court it is as routine in, for example, 1990 as the *Schmerber* blood test was in 1966. This analysis ignores the vast difference between the minor intrusion of a needle stick versus a major intrusion several inches into the chest wall. In fact, the Court states such a minor/major characterization is not controlling in their view.¹¹²

Arguably, *Schmerber's* case-by-case approach is inadequate. While the totality-of-the-circumstances and the balancing-the-factors approaches have served the interests of justice over the last thirty years, technology has advanced to a point where it can too easily stack those factors against the individual's interest in the sanctity of his person. The case law must move with the decades. Therefore, arguably, the Court should have drawn a bright-line standard saying, in effect, "beyond this point, you shall not go."

V. A Proposed Chalkline

While a totality-of-the-circumstances approach has worked well in

110. *Winston*, __ U.S. __, 53 U.S.L.W. 4367 (March 20, 1985).

111. *Id.* at 9.

112. *Id.* at 10-11 n.99.

the past, *Winston v. Lee* demonstrated the fact that this test is hard to apply in the shadows of developing technology. Even while signaling a need for a more structured framework for the analysis of these delicate fourth amendment searches, *Winston*, itself, suggested where the courts can draw the first line of that framework. While the district court was hesitant to cite a single factor as controlling its belief that the surgery involved was unreasonable,¹¹³ it still acknowledged that the use of general anesthesia was important to its decision.

General anesthesia is a logical, just and fair place to draw a line limiting the state's intrusion inside the human body. It is also a sufficiently flexible standard. For example, if the surgery is elective, courts can draw the line at general anesthesia and hold all procedures requiring it constitutionally unreasonable. If, however, the surgery is necessary to the health of the defendant, such that the surgery would be required anyway, a court could allow the use of the evidence obtained from this surgery since the general anesthesia was necessary for the surgery, not the search.

An unreasonable search is characterized as one violative of the sanctity, dignity, and privacy of the human body.¹¹⁴ What could be more violative of that sanctity than the restraint and control exercised by rendering one's conscious mind inactive and ransacking through the body in search of evidence to be used against one, should one survive the procedure itself? The potential for abuse is vast. For if we justify bodily searches involving general anesthesia on the basis of our technological advances, we must inevitably justify a search of one's mind whenever our technology reaches that level of sophistication—only on probable cause, of course.

The Framers of the fourth amendment did not have the resources to foresee the possibilities inherent in the general language of the amendment they drafted. But our jurisprudence and science fiction make us better soothsayers. In order to prevent the abuses within our technological grasp, it makes sense to draw the line at general anesthesia and say, "beyond this point, you shall not go."

VI. Conclusion

The fourth amendment to the United States Constitution protects the sanctity of the individual from unreasonable searches and seizures.

113. *Lee*, 551 F. Supp. at 261.

114. *Schmerber*, 384 U.S. at 770.

The surgical search of the human body is the most intrusive search possible. While traditionally case law has balanced the totality of the circumstances on a case-by-case basis to determine the reasonableness of a surgical search, technology is forcing the courts to structure more carefully a framework for this delicate fourth amendment analysis in order to prevent the potential abuses inherent in runaway jurisprudence. A special standard is necessary to test a particular surgical search for constitutional reasonableness. A rational, workable, special standard is a simple bright-line rule. An intrusion requiring the use of general anesthesia should be held per se constitutionally unreasonable absent a special, clear showing that general anesthesia was necessary for the defendant's health or life, and not necessary for the surgical search alone. Only by such a bright-line rule can the potential for serious abuse be curtailed and the further erosion of fourth amendment rights be halted.

Robin S. Richards

Problems of Convicting a Husband for the Rape of his Wife

I. Introduction	351
II. History of the Marital Exemption; Myths and Policies	353
III. Florida's Sexual Battery Statute and Florida Cases: Obtaining Convictions for Marital Rape	357
A. Florida Statutes Section 794.011(3) — Life Felony	358
B. Florida Statutes Section 794.011(4)(a), (b), (c)—Felony of the First Degree	360
C. Florida Statutes Section 794.011(5)—Felony of the Second Degree	364
D. Florida Statutes Section 794.022—Rape Shield	365
E. Resistance	369
IV. Attitudes of Victims, Police, Prosecutors, Judges and Jurors: Impact on Marital Rape Convictions	370
A. Victim Awareness and Cooperation	371
B. Police Assistance	374
C. Prosecutor Discretion	375
D. Attitude of the Bench	376
E. The Jury	379
V. Conclusion	380

I. Introduction

Society has recognized family violence as a pervasive and serious problem requiring intervention by the criminal justice system. One form of family violence is marital rape, which is both brutal and degrading. Surprisingly, marital rape has not received much public attention even though it occurs with alarming frequency. Reportedly, one out of seven women "who has ever been married, has been raped by a

husband at least once, and sometimes many times over many years."¹ Despite the frequency and seriousness² of marital rape, only seven states have totally abolished the marital rape exemption for husbands.³

1. D. RUSSELL, *RAPE IN MARRIAGE* 2 (1982). This statement is based on a random sample of 930 women and generalized to the population at large.

2. Schwartz, *The Spousal Exemption for Criminal Rape Prosecutions*, 7 VERMONT L. REV. 33, 46 (1983). "Rape crisis center counselors have claimed that some of the most seriously injured women, particularly in injuries to vaginal walls, are raped spouses." *Id.*

3. The marital exemption has been completely abolished in Florida, Massachusetts, Nebraska, New Jersey, New York, Oregon and Wisconsin. *See* FLA. STAT. § 794.011 (1983 and Supp. 1984), (*State v. Smith*, 401 So. 2d 1126 (Fla. 5th Dist. Ct. App. 1981), *State v. Rider*, 449 So. 2d 903 (Fla. 3d Dist. Ct. App. 1984), *review denied*, 458 So. 2d 273 (1984) *appeal dismissed*, *Rider v. Florida*, 53 U.S.L.W. 3686 (U.S. March 26, 1985)(No.84-6164); MASS. GEN. LAWS ANN. ch. 265, § 22 (West Supp. 1983), *Commonwealth v. Chretien*, 383 Mass. 123, 417 N.E.2d 1203 (1981); NEB. REV. STAT. § 28-319, 28-320 (1979); N.J. STAT. ANN. § 2c: 14-5(b)(1982); N.Y. PENAL LAW § 130.00 (McKinney Supp. 1983-1984), *People v. Liberta*, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984); OR. REV. STAT. § 163.305 (1983); WIS. STAT. ANN. § 940.225(6)(West Supp. 1983-1984).

Thirty-five states have retained the exemption in some instances, depending on whether spouses have separated, are living apart, have filed a petition for annulment, divorce or separate maintenance or for third degree sexual abuse, etc.: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington and Wyoming. *See* ALASKA STAT. § 11.41.445(a) (1983); ARIZ. REV. STAT. ANN. § 13-1407.D (Supp. 1983-1984); ARK. STAT. ANN. §§ 41-1801, 41-1802, 41-1803, 41-1804 (1977); COLO. REV. STAT. § 18-3-409 (1978); CONN. GEN. STAT. ANN. §§ 53a-65, 53a-67 (West Supp. 1984); DEL. CODE ANN. tit. 11, §§ 763, 764 (1979 & Supp. 1984); HAWAII REV. STAT. §§ 707-730, 707-731, 707-732 (Supp. 1983); IDAHO CODE § 18-6107 (1979 & Supp. 1984); ILL. ANN. STAT. ch. 38, §§ 12-12, 12-13, 12-14, 12-15, 12-16, 12-17, 12-18(c) (*Smith Hurd Supp.* 1984-1985); IND. CODE ANN. § 35-42-4-1(b) (*Burns Supp.* 1984); IOWA CODE ANN. § 709.4 (West 1979 & Supp. 1984-1985); KAN. STAT. ANN. §§ 21-3502, 21-3517, 21-3518 (Supp. 1983); KY. REV. STAT. ANN. § 510.010(3)(B) (*Bobbs-Merrill* 1975 & Supp. 1984); LA. REV. STAT. ANN. § 14:41 (West Supp. 1984); ME. REV. STAT. ANN. tit. 17-A §§ 252.2, 253 (West 1983 & Supp. 1983-1984); MD. ANN. CODE art. 27, § 464D (1982); MICH. COMP. LAWS ANN. § 750.5201 (West Supp. 1984-1985); MINN. STAT. ANN. § 609.349 (West Supp. 1984); MISS. CODE ANN. § 97-3-99 (1983); MO. ANN. STAT. §§ 566.010, 566.030 (*Vernon* 1979 & Supp. 1984); MONT. CODE ANN. § 45-5-511(2) (1983); NEV. REV. STAT. § 200.373 (1983); N.H. REV. STAT. ANN. §§ 632-A:2, 632-A:3, 632-A:5 (Supp. 1983) (exemption retained in statutory rape and cases of mentally defective victim-wives); N.M. STAT. ANN. §§ 30-9-10E, 30-9-11 (1978 & Supp. 1983); N.C. GEN. STAT. § 14-27.8 (1981); N.D. CENT. CODE § 12.1-20-01 (1983); OHIO REV. CODE ANN §

In these seven states, however, even though a husband can be prosecuted if he rapes his wife, many obstacles to obtaining a conviction remain.

The purpose of this note is to give practitioners and judges insight into the problems of obtaining convictions for marital rape. The note begins with a discussion of the background of the marital rape exemption for husbands. The historical background aids in understanding the effect of Florida's Sexual Battery Statute⁴ and corresponding case law on convictions. Finally, the note explores the attitudes of victims, police, prosecutors, judges and juries to determine their respective impact on convictions for marital rape.

II. History of the Marital Rape Exemption; Myths and Policies

Many states have embraced as part of their common law and eventually within their statutes the notion that a husband cannot be prosecuted for raping his wife. The exemption for husbands is credited to Sir Matthew Hale, who proposed the idea in a treatise he wrote in 1736.⁵ Hale, however, did not base his proposition on case law or any

2907.01L (Page 1982); PA. STAT. ANN. tit. 18 §§ 3103, 3121 (Purdon 1983); R.I. GEN. LAWS § 11-37-1 (1984); S.C. CODE ANN. § 16-3-658 (Law. Co-op. Supp. 1983); TENN. CODE ANN. § 39-2-610 (1982); TEX. PENAL CODE ANN. § 22.011(c)(2) (Vernon Supp. 1984); UTAH CODE ANN. § 76-5-407 (Supp. 1983); VA. CODE § 18.2-61 (1982), *Weishaupt v. Commonwealth*, 277 Va. 389, 315 S.E.2d 847 (1984), *Kiser v. Commonwealth*, ___ Va. ___, 321 S.E.2d 291 (1984); WASH. REV. CODE ANN. § 9A.44.010 (Supp. 1984-1985); WYO. STAT. ANN. §§ 6-2-301, 6-2-302, 6-2-306, 6-2-307 (1983).

California and West Virginia have a separate statute for marital rape. *See* CAL. PENAL CODE § 262 (Deerings Supp. 1984) (requires 90 day reporting period); W.VA. CODE § 61-8B-6 (Supp. 1984) (cohabitators are exempt).

Alabama, Georgia, Oklahoma, South Dakota and Vermont completely adhere to the marital exemption. *See* ALA. CODE §§ 13A-6-60(4), 13A-6-61 (1975 & Supp. 1984); GA. CODE ANN. § 16-6-1 (1984) (retains common-law definition, requiring carnal knowledge); OKLA. STAT. ANN. tit. 21, § 1111 (West Supp. 1983-1984); S.D. CODIFIED LAWS ANN. § 22-22-1 (Supp. 1984); VT. STAT. ANN. tit. 13 § 3252 (Supp. 1984).

The District of Columbia statute is silent as to the exemption. *See* D.C. CODE ANN. § 22-2801 (1981 & Supp. 1984).

4. FLA. STAT. ch. 794 (1983 & Supp. 1984).

5. 1 M. HALE, HISTORY OF THE PLEAS OF THE CROWN § 629 (1736) ("[T]he hu[s]band cannot be guilty of a rape committed by him[s]elf upon his lawful wife, for by their mutual matrimonial con[s]ent and contract the wife hath given up her[s]elf in this kind unto her hu[s]band, which [s]he cannot retract").

other cited authority.⁶ Therefore, the doctrine is without significant legal underpinnings⁷ and is not technically a part of the common law. Despite this shaky legal foundation, the exemption for husbands exists in some form in most jurisdictions today⁸ and reflects many of the same myths, fears and policies which prompted Sir Matthew Hale to propose the exemption in his eighteenth century treatise.

Several myths concerning the relationship of husband and wife and the role of women have created obstacles in prosecuting a husband for the rape of his wife.⁹ The marital exemption is partially based on the misguided belief that a wife consents to intercourse in marriage and this consent is irrevocable.¹⁰ Another foundation for the marital exemption is the old legal fiction that a husband and wife are one person and the husband is that person.¹¹ This single-being theory makes it impossible for a husband to be legally sanctioned for the rape of his wife since he cannot be prosecuted for raping himself.¹² The exemption also stems from the antiquated notion that women are property,¹³ and that a husband can, therefore, treat his wife any way he pleases. Another myth is the belief that a woman must actively resist the rape in order for the act to be considered non-consensual.¹⁴ Still another prevalent fallacy is that if a woman has had prior sexual experience, she has probably consented to the present act of rape.¹⁵ Finally, there is the suspicion that women often bring rape charges which are unfounded.¹⁶ These myths have a sometimes subtle, sometimes clear impact on the decision to report marital rape, police inaction to the reports, discretion of the

6. *Rider*, 449 So. 2d at 904.

7. *State v. Smith*, 85 N.J. 193, 200, 426 A.2d 38, 41 (1981).

8. See *supra* note 3 for a review of the states which cling to the proposition in various instances.

9. Note, *Marital Rape in California: For Better or for Worse*, 8 SAN. FERN. V.L. REV. 239, 242-250 (1980).

10. Pracher, *The Marital Rape Exemption: A Violation of a Woman's Right of Privacy*, 11 GOLDEN GATE L. REV. 717, 721 (1981).

11. Note, *The Marital Rape Exemption: Legal Sanction of Spouse Abuse*, 18 J. FAM. L. 565, 569 (1980).

12. Note, *The Marital Rape Exemption*, 27 LOY. L. REV. 597, 599 (1981).

13. *Smith*, 401 So. 2d at 1128.

14. Schwartz, *An Argument for the Elimination of the Resistance Requirement from the Definition of Forcible Rape*, 16 LOY. L.A.L. REV. 567, 568-70 (1983).

15. See generally Note, *If She Consented Once, She Consented Again—A Legal Fallacy in Rape Cases*, 10 VAL. U.L. REV. 127 (1976).

16. Note, *The Victim of a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 336 (1973).

prosecutor to prosecute, judges' rulings, and jury decisions.

Many states have introduced rape shield statutes¹⁷ in an attempt to protect all rape victims from the myths which tend to make them the victims of the criminal justice system as well as the victims of rape. Unfortunately, rape shield statutes do not always accomplish this goal. Some states have rape shield statutes which may require victim resistance or corroboration of the rape, or authorize jury instructions which insinuate the victim may not be telling the truth¹⁸ or permit the admission of the victim's prior sexual conduct into evidence to prove consent. These three statutory requirements provide a thin shield. The resistance requirement is based on the myth that a truly chaste woman would "resist to the utmost"¹⁹ to protect her honor. However, because resistance can be fatal and because the victim's common and automatic

17. The following rape shield statutes deal with the admissibility of evidence of prior sexual conduct: ALA. CODE § 12-21-203 (Supp. 1984); ALASKA STAT. § 12.45.045 (1980); ARK. STAT. ANN. § 41-1810.1, .2, .4 (1977 & Supp. 1983); CAL. EVID. CODE § 1103 (Deering 1967 & Supp. 1984); COLO. REV. STAT. § 18-3-407 (1978 & Supp. 1983); CONN. GEN. STAT. ANN. § 54-86F (West 1983); DEL. CODE ANN. tit. 11, § 3509 (1979); FLA. STAT. § 794.022 (1983); GA. CODE ANN. § 24-2-3 (1982 & Supp. 1984); HAWAII REV. STAT. § 626 R.412 (Supp. 1983); IDAHO CODE § 18-6105 (1979 & Supp. 1984); ILL. ANN. STAT. ch. 38, § 115-7 (Smith-Hurd Supp. 1983); IND. CODE ANN. § 35-37-4-4 (Burns Supp. 1984); IOWA CODE ANN. R.412 (West Supp. 1984); KAN. STAT. ANN. § 21-3525 (Supp. 1983); KY. REV. STAT. ANN. § 510.145 (Bobbs-Merrill Supp. 1984); LA. REV. STAT. ANN. § 15:498 (West 1981 & Supp. 1984); MD. ANN. CODE art. 27, § 461A (1982 & Supp. 1983); MASS. GEN. LAWS ANN. ch.233, § 21B (West Supp. 1984); MICH. COMP. LAWS ANN. § 750.520j (West Supp. 1984); MINN. STAT. ANN. § 609.347 (West Supp. 1984); MISS. CODE ANN. § 97-3-70 (Supp. 1983); MO. ANN. STAT. § 491.015 (Vernon Supp. 1984); MONT. CODE ANN. § 45-5-503(5) (1984); NEB. REV. STAT. §§ 28-321 to 323 (1979); NEV. REV. STAT. § 50.090 (1981); N.H. REV. STAT. ANN. § 632-A:6 (Supp. 1983); N.J. STAT. ANN. § 2A: 84A-32.1 to .2 (West Supp. 1984); N.M. STAT. ANN. § 30-9-16 (1978 & Supp. 1983); N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1981); N.C. GEN. STAT. § 8-58.6 (1981); N.D. CENT. CODE § 12.1-20-14 (1976); OHIO REV. CODE ANN. §§ 2907.02(D)-.02(F) (PAGE 1983); OKLA. STAT. ANN. tit. 22, § 750 (West Supp. 1983); PA. CONS. STAT. ANN. ch 18, § 3104 (Purdon 1983); R.I. GEN. LAWS § 11-37-13 (1981); S.C. CODE ANN. § 16-3-659.1 (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 23A-22-15 (1979); TENN. CODE ANN. § 40-17-119 (1982); TEX. PENAL CODE ANN. § 22.065 (Vernon Supp. 1984); VT. STAT. ANN. tit. 13, § 3255 (Supp. 1984); VA. CODE § 18.2-67.7 (1982); WASH. REV. CODE ANN. § 9A.44.020 (West Supp. 1984); W.VA. CODE [[61-6B-11 (Supp. 1984); WIS. STAT. § 972.11(2)(b) (Supp. 1983); WYO. STAT. § 6-2-312 (1983).

18. See generally Hibey, *The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent and Character*, 11 AM. CRIM. L. REV. 309 (1973).

19. Schwartz, *supra* note 14, at 568-70.

reaction is to freeze rather than fight back,²⁰ states with the resistance requirement may be promoting more harm than good. The basis for the corroboration requirement is Sir Matthew Hale's proposition that a charge of rape is easily made and hard to defend.²¹ The judge's cautionary instructions to the jury to consider the "weight and quality"²² of the evidence presented by the victim is based on the same rationale. These instructions tend to plant in the juror's mind the notion that the victim's credibility should be examined more carefully in a rape case than in other types of cases.²³ Finally, evidence of prior sexual conduct is sometimes admitted to imply that if "she consented once, she consented again."²⁴ Admission of this evidence in marital rape cases makes prosecution especially difficult since there will almost always have been prior consensual sexual relations. The element of consent is perhaps the most critical issue in a case of rape. Prior sexual conduct and evidence of general reputation, if admitted, may also impact on the credibility of the victim.²⁵

In addition to the many myths, the marital exemption rests on the fear that women will falsely charge their husbands with rape in retaliation for a perceived wrong.²⁶ This fear creates an apprehension that removing the exemption will open the floodgates of litigation, and courts will be unable to handle the onslaught.²⁷ An additional justification for the exemption is the belief that the fear and humiliation experienced by a victim of spousal rape is not as great as the fear and humiliation experienced by a victim who is raped by a stranger.²⁸

Finally, there are two underlying policy rationales that impact on the marital exemption and the problems of proof. First is the belief that states should not interfere with the "sanctity of marriage".²⁹ The argument is that the state should foster family unity and not aid in divorce,

20. *Id.* at 576-82.

21. Hale, *supra* note 5, § 635. See also Note, *Rape Reform Legislation and Evidentiary Concerns: The Law in Pennsylvania*, 44 U. PITT. L. REV. 955, 973 (1983).

22. FLA. STAT. § 794.022(1)(1975)(amended in 1983 to delete the cautionary instruction).

23. Note, *supra* note 21, at 973.

24. See generally Note, *supra* note 15, at 127.

25. *Id.* at 132.

26. Note, *supra* note 12, at 600. See also Pracher, *supra* note 10, at 732-37.

27. Schwartz, *supra* note 2, at 52.

28. *Id.* at 45-46. See also Harmon, *Consent, Harm and Marital Rape*, 22 J. FAM. L. 423, 432 (1983-1984).

29. See Note, *supra* note 12, at 603.

since if a wife charges her husband with rape, the marriage will be likely over with little chance for reconciliation.³⁰ The second policy behind the exemption is the idea that proving a case of marital rape is next to impossible,³¹ and that, the exemption for husbands is realistic and should, therefore, continue.

III. Florida's Sexual Battery Statute and Florida Cases: Obtaining Convictions for Marital Rape

Florida's present Sexual Battery Statute, section 794 of the Florida statutes³² was enacted in 1974 and makes no mention of spousal immunity. Prior to 1974, Florida's rape statute³³ reflected the common-law myths and notions about rape. The earlier statute provided that a person was guilty of rape if he "unlawfully ravished and carnally"³⁴ knew another. Since carnal knowledge of one's wife was considered lawful under the old statute, husbands were exempt from prosecution for raping their wives.³⁵ One early interpretation of the present statute, Florida Statute section 794, was that because the marital exemption was not mentioned, there was still a common law exception for husbands.³⁶ Between 1974 and 1980, there were no reported cases involving marital rape which tested the present Florida Statutes section 794 to determine if it included a spousal exemption. However, since 1981 two cases have held that there is no interspousal exemption excluding a husband from prosecution for the sexual battery of his wife.³⁷ Although the Florida Third and Fifth District Courts of Appeal have recognized

30. *Id.* at 602. *See also* Note, *supra* note 9, at 246; *People v. Liberta*, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984)(the court rejected this argument as lacking a rational basis in an equal protection challenge).

31. Schwartz, *supra* note 2, at 48-51; *See also* *People v. Brown*, ___ Colo. ___, 632 P.2d 1025 (1981)(asserting problems of proof in marital rape which justify statutory exclusion of husbands from prosecution).

32. FLA. STAT. §§ 794.011-.05 (1974).

33. FLA. STAT. § 794.01 (1973).

34. *Id.*

35. *See* Note, *Florida's Sexual Battery Statute: Significant Reform but Bias Against the Victim Still Prevails*, 30 U. FLA. L. REV. 419, 429 (1978).

36. *Id.*

37. *Smith*, 401 So. 2d at 1127 (there is no common-law exemption in a factual situation where the couple were separated, had filed for a divorce and a restraining order was issued); *Rider*, 449 So. 2d. at 904 (holds that there is no interspousal exemption in a factual situation where the couple was living together and no separation had occurred.)

that husbands can be prosecuted for spousal rape,³⁸ Florida Statutes section 794, nonetheless, inherently retains some of the myths about rape which may limit convictions. The statute recognizes four levels of severity, and the punishment reflects the age of the victim and the degree of force used.³⁹ Subsections (3), (4) and (5) of section 794.011⁴⁰ are particularly relevant to marital rape.⁴¹

A. Florida Statutes Section 794.011(3)—Life Felony

A husband who is convicted of sexual battery upon his wife under Florida Statutes section 794.011(3) is guilty of a life felony.⁴² Section 794.011(3) requires lack of consent and the use of a deadly weapon, or the use of actual physical force likely to cause serious personal injury.⁴³ Serious personal injury is defined as "great bodily harm or pain, permanent disability, or permanent disfigurement."⁴⁴ Because of the history of prior consensual sexual relations in a marriage, the prosecutor may not be induced to bring charges against a husband unless the severity of violence required by Florida Statutes section 794.011(3) exists.⁴⁵ Police will more likely make an arrest in marital disputes where there are serious injuries;⁴⁶ however, since the punishment involved may be life imprisonment, the jury will examine both the victim and

38. *Smith*, 401 So. 2d at 1127; *Rider*, 449 So. 2d at 904.

39. Note, *supra* note 35, at 422.

40. FLA. STAT. § 794.011(3), (4), (5) (1983 & Supp. 1984).

41. FLA. STAT. § 794.011(2) (Supp. 1984) will not be discussed since it addresses sexual battery of a person twelve years old or younger, and is therefore not applicable to marital rape.

42. FLA. STAT. § 775.082(3)(a) (1983) states:

For a life felony committed prior to Oct 1, 1983, by a term of imprisonment for life, or a term of years, not less than 30; and for a life felony committed on or after Oct 1, 1983, by a term of imprisonment for life, or a term of imprisonment not exceeding 40 years.

See also FLA. STAT. 775.083(1)(a) (1983)(indicating there may also be a fine of fifteen thousand dollars) and FLA. STAT. § 775.084 (1983)(providing for imposition of an extended term based on the accused's prior record).

43. FLA. STAT. § 794.011(3) (1983 & Supp. 1984).

44. FLA. STAT. § 794.011(1)(g) (Supp. 1984).

45. L. LERMAN, PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN CRIMINAL JUSTICE RESPONSE (1981). See also *News/Sun Sentinel*, Sept. 1, 1984, at A1, col. 1 (William Rider was found guilty of raping his wife after he beat her, bound her to the bed with duct tape, and raped her. She required hospital treatment.).

46. L. LERMAN, *supra* note 45, at 26.

her testimony very closely.⁴⁷ Even in a violent situation, the jury will usually acquit the accused when he and the victim have had a prior sexual relationship.⁴⁸ Therefore, while the existence of physical violence evidenced by severe physical injury to the victim is likely to result in police action on the reported incident, and prosecution by prosecutors,⁴⁹ the jury may still fail to convict the husband either because of the prior sexual relationship,⁵⁰ or the severity of the punishment, or both.⁵¹

Convictions are also unlikely under the portion of Florida Statute section 794.011(3) which provides for a life felony for the threatened use of a deadly weapon without serious personal injury. The jury may decide that the lack of severe personal injury does not warrant a conviction when the penalty is so severe,⁵² and, therefore, may acquit the defendant.⁵³ As a compromise, even though the attack may meet the requirements of section 794.011(3), the jury may be inclined to convict a husband on a lesser included offense or on an alternate charge because the punishment will be less severe.⁵⁴ In order to be assured of convicting on a lesser included offense or alternate charge, the prosecutor must object to jury instructions which do not instruct on appropriate lesser included offenses.⁵⁵ Also, the prosecutor must plead on alternative grounds in some instances because some sections of the statute which provide lesser penalties are not necessarily lesser included offenses, unless they contain all the elements of the more serious offense.⁵⁶ An offense that is not a lesser included offense must be "spelled out in the accusatory pleading."⁵⁷

47. Schwartz & Clear, *Towards a New Law on Rape*, 26 CRIME & DELINQ. 129, 134 (1980).

48. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 251 (1966).

49. L. LERMAN, *supra* note 45, at 39.

50. H. KALVEN & H. ZEISEL, *supra* note 48.

51. Schwartz & Clear, *supra* note 47.

52. *Id.*

53. H. KALVEN & H. ZEISEL, *supra* note 48.

54. Findlay, *The Cultural Context of Rape*, 60 WOMAN L.J. 199, 205 (1974).

55. *See* Davenport v. State, 429 So. 2d, 1352 (Fla. 2d Dist. Ct. App. 1983), where the court found that failure "to instruct the jury as requested on battery as an appropriate lesser included offense of sexual battery, was per se reversible error". *Id.* at 1353-54.

56. *See, e.g.,* Bragg v. State, 433 So. 2d 1375, 1377 (Fla. 2d Dist. Ct. App. 1983)("[s]exual battery using slight force is not a necessarily included offense of sexual battery under subsection (3), when the defendant is charged with the use or threatened use of a deadly weapon").

57. *Id.*

B. Florida Statutes Section 794.011(4)(a), (b), (c)—Felony of the First Degree

A felony of the first degree⁵⁸ will result if the husband is convicted of any of the listed offenses in section 794.011(4). Three subsections of 794.011(4) are relevant to marital sexual battery.⁵⁹ Section 794.011(4)(a) permits a conviction for sexual battery "[w]hen the victim is physically helpless to resist."⁶⁰ The phrase "physically helpless to resist" is defined as sexual battery against a person who is "unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act."⁶¹

According to one theory, however, a husband's intercourse with his wife who is physically helpless to resist is not the type of violence that truly represents marital rape.⁶² This permissive-license theory is based on the idea that in marriage there exists permissive consent to intercourse, having characteristics of a license.⁶³ The license is not revoked until an objection is made.⁶⁴ In the case of a wife who is sleeping, unconscious or physically unable to communicate unwillingness to intercourse, the permissive-license of consent to sexual relations has not been revoked.⁶⁵ Without revocation there is no sexual battery because the wife has in effect consented, and sexual battery, of course, requires a lack of consent by the victim.⁶⁶ Permissive-license theorists believe that reforms such as the "physically helpless to resist"⁶⁷ subsection of the Florida statute do not apply in marital rape cases and detract from the seriousness of what they perceive as *real* marital rape, which is a violent crime.⁶⁸ However, under the permissive-license theory, Florida Statutes section 794.011(4)(a) is applicable in non-marital situations,

58. See FLA. STAT. § 775.082(3)(b) (1983) which provides for a penalty of imprisonment not to exceed thirty years. See also FLA. STAT. § 775.083 (1)(b) (1983) indicating that a fine of not more than ten thousand dollars may also be required. FLA. STAT. § 775.084(4)(a)(1) (1983) provides a life sentence for a "habitual offender".

59. FLA. STAT. § 794.011(4)(a), (b), (c) (1983 & Supp. 1984)

60. FLA. STAT. § 794.011(4)(a) (1983 & Supp. 1984)

61. FLA. STAT. § 794.011(1)(e) (Supp. 1984).

62. Harmon, *supra* note 28, at 429.

63. *Id.* at 434.

64. *Id.* at 435.

65. *Id.* at 437.

66. See FLA. STAT. § 794.011(4) (1983 & Supp. 1984).

67. FLA. STAT. § 794.011(4)(a) (1983 & Supp. 1984).

68. Harmon, *supra* note 28, at 429.

since there is not a permissive license of consent to intercourse.⁶⁹

Despite the existence of the permissive-license theory, one may argue that section 794.011(4)(a) does apply in marital rape cases. The defense of consent in any rape case requires that the consent be "intelligent, knowing, and voluntary."⁷⁰ One cannot give intelligent, knowing, and voluntary consent when asleep. Common sense, however, indicates that intercourse while a wife is sleeping, without more, will not in all likelihood motivate a jury to convict for this first degree felony. As indicated, juries are reluctant to convict when there is a prior relationship, even with evidence of violence.⁷¹ For these reasons, the hyperbolic conclusion is that unless the wife is in a coma and the husband repeatedly rapes his wife in the presence of witnesses, a violation of section 794.011(4)(a) will not likely result in a conviction.

Two other subsections of section 794.011(4) deal with threats of violence. These subsections proscribe perhaps the most common sexual batteries between husbands and wives. Subsection 794.011(4)(b) provides a first degree felony penalty when an "offender coerces the victim to submit by threatening to use force or violence likely to cause serious personal injury on the victim and the victim reasonably believes that the offender has the present ability to execute the threats."⁷² Subsection (c) provides the same first degree penalty if the offender threatens "to retaliate against the victim or any other person, and the victim reasonably believes that the offender has the ability to execute the threats in the future."⁷³ Retaliation "includes, but is not limited to, threats of future physical punishment. . . ."⁷⁴ Studies have shown that more than one-third of battered women have been raped by their husbands.⁷⁵ "Women may accede to sexual intercourse with their husbands to avoid being battered. . . . [s]ome husbands regard a wife's refusal of sexual intercourse as grounds for beating or intimidation."⁷⁶ Therefore, battery or the threat of battery against wives by their husbands often in-

69. *Id.* at 438.

70. FLA. STAT. § 794.011(1)(a) (Supp. 1984).

71. H. KALVEN & H. ZEISEL, *supra* note 48, at 251.

72. FLA. STAT. § 794.011(4)(b) (1983 & Supp. 1984).

73. FLA. STAT. § 794.011(4)(c) (1983 & Supp. 1984).

74. FLA. STAT. § 794.011 (1)(f) (Supp. 1984).

75. Findelhor & Yllo, *Forced Sex in Marriage: A Preliminary Research Report*, 28 CRIME & DELINQ. 459, 460 (1982)(citing studies made by Spektor, Giles-Sims, and Pagelow).

76. Freeman, "But If You Can't Rape Your Wife; Who[m] Can You Rape?": *The Marital Rape Exemption Re-examined*, 15 FAM. L.Q. 1, 5 (1981).

cludes sexual battery.⁷⁷

Evidence presented by a wife at trial that she suffered from battered wife syndrome⁷⁸ would be useful to support her claim of sexual battery under Florida Statutes section 794.011(4), subsections (b) and (c).⁷⁹ A spouse who remains in a situation where she has been physically abused more than once is referred to as a battered wife.⁸⁰ The battering episodes usually run in cycles, with three distinct stages.⁸¹ The episodes begin with minor battering incidents which then intensify into more serious violence, and finally into a stage of contrition and reconciliation, until the cycle begins again.⁸² However, evidence of battered wife syndrome would be inadmissible if its admission was solely for the purpose of showing bad character or propensity of the husband to commit the crime.⁸³ Nonetheless, such evidence has been admitted in homicides where the defense was self-defense, to show that the party had a reasonable and honest belief she was in danger of serious bodily harm.⁸⁴ Because subsections (b) and (c) of Florida Statutes section 794.011(4) require that the "victim reasonably believe that the offender has the ability to execute these threats,"⁸⁵ evidence of battered wife syndrome would aid the jury in determining the reasonableness and honesty of her belief. In homicides, self-defense is usually an overt,

77. *Id.* at 5, 6.

78. Finesmith, *Police Response to Battered Women: A Critique and Proposals for Reform*, 14 SETON HALL L. REV. 74, 82 (1983). Battered wife syndrome is the term used to describe typical reactions of physically abused women. A battered wife often does not leave her husband or seek other relief because of a feeling of helplessness, lack of other emotional and economic resources and a fear of retaliation by her husband.

79. FLA. STAT. § 794.011(b)(c) (1983 & Supp. 1984).

80. *State v. Kelly*, 97 N.J. 178, 193, 478 A.2d 364, 371 (1984)(citing L. WALKER, *THE BATTERED WOMAN* (1979)).

81. *Id.*

82. *Id.*

83. FLA. STAT. § 90.404(2)(a) (1983).

84. In *Kelly*, 97 N.J. at 204, 478 A.2d. at 377, the court stated that the expert's testimony on the battered woman syndrome is admissible, in a homicide, as relevant to the honesty and reasonableness of defendant's belief that deadly force was necessary to protect her against death or serious bodily harm. See *Borders v. State*, 433 So. 2d 1325, 1327 (Fla. 3d Dist. Ct. App. 1983), where the court noted that in a homicide, testimony of a clinical psychologist relating to battered wife syndrome should be allowed if the trial court feels it is sufficiently developed and the expert is qualified. See also *Hawthorne v. State*, 408 So. 2d 801 (Fla. 1st Dist. Ct. App. 1982), *cert. denied mem.*, 415 So. 2d 1361 (Fla. 1982).

85. FLA. STAT. § 794.011(4)(b), (c) (1983 & Supp. 1984).

aggressive act, undertaken to protect one's self from serious bodily harm or death.⁸⁶ In sexual battery, on the other hand, self-defense is often a passive act of submission, also undertaken to protect one's self from serious bodily harm. Although the act of self-defense in sexual battery is often passive, the similarity to the concept of self-protection indicates that the admission of battered wife syndrome evidence is justified under Florida's Sexual Battery Statute in marital rape cases.⁸⁷ Because many of these wives will use the passive method of self-defense, evidence that she has been battered in the past will show that she reasonably believed her husband had the ability to carry out his threats. With the admission of battered wife syndrome evidence, a wife with a history of being abused may be viewed by the jury as a more credible witness than a rape victim who did not previously know her assailant. Evidence of past abuse will reinforce her credibility by proving to the jury the reasonableness of her fear of future or present retaliation, and provide an explanation for her submission to the sexual battery. Of course, the danger of admitting the evidence is that jurors may decide the battered wife consented to the violence because she stayed in the relationship with her husband. Actually, there is an array of sociological reasons the battered wife remains with her husband, but true consent to the abuse is not one of them.⁸⁸ In *Hawthorne v. State*,⁸⁹ for example, the court ruled that expert testimony regarding battered wife syndrome was admissible in a first degree homicide where the defense was self defense. This court reasoned that the testimony was necessary to inform the jury that staying in the home was reasonable because it is a common symptom of the syndrome.⁹⁰ In *Borders v. State*,⁹¹ the court reversed and remanded a first degree homicide conviction, ruling that expert testimony on battered wife syndrome is admissible as long as the trial court finds the expert is qualified and "the subject matter is sufficiently developed so that it can support an expert opinion."⁹² In *Borders*, the husband and wife often drank alcohol, which led to violent fights. The husband beat his wife with his fists and sometimes used weapons such as a frying pan. The fights were often so severe that

86. *Hawthorne*, 408 So. 2d at 806.

87. There have not been any Florida cases applying this rationale to sexual battery as yet.

88. *Kelley*, 97 N.J. at 194-97, 478 A.2d at 372-73.

89. *Hawthorne*, 408 So. 2d at 801.

90. *Id.* at 807.

91. 433 So. 2d at 1325.

92. *Id.* at 1327.

friends and the couple's children would intervene because they feared that the wife would be killed. On the day of the homicide, the couple had been drinking and began arguing. The husband punched his wife in the breast. The wife ordered her husband out of the house, he left for a short while and then returned. When he returned, a shoving match occurred. The wife, armed with a kitchen knife, stabbed her husband, who was dead when authorities arrived.⁹³ The court asserted that in a homicide prosecution the defendant should be allowed to introduce a wide array of testimony to support a self-defense theory.⁹⁴ Arguably, the court should afford the victim of sexual battery the same latitude. Evidence of battered wife syndrome should be admitted to show the reasonableness of the wife's beliefs that her husband will carry out his threats. If evidence of previous wife battering is inadmissible, a wife may be at a greater disadvantage than the victim of a rape by a stranger. The jury may find that a wife would not reasonably believe that her own husband would actually carry out such threats, and therefore the jury may not convict him.

C. Florida Statutes Section 794.011(5)—Felony of the Second Degree

Florida Statutes section 794.011(5) provides for a penalty of felony in the second degree⁹⁵ for sexual battery involving a lower level of force than required for the first degree felony sections of the statute. Section 794.011(5) provides a sanction when the offender uses "physical force and violence not likely to cause serious personal injury."⁹⁶ With married couples, the use of this level of force⁹⁷ may not be viewed as sexual battery by the jury. The jury, as a cross-section of the community, will reflect common attitudes about rape. Some women do not consider a coercive act of intercourse as rape even when there is a lack of mutual consent to the intercourse.⁹⁸

93. *Id.* at 1326.

94. *Id.*

95. FLA. STAT. § 775.082(3)(c) (1983) provides for a term of imprisonment not to exceed fifteen years. FLA. STAT. § 775.083(1)(b) (1983) indicates the penalty may include a fine of up to ten thousand dollars. FLA. STAT. § 775.084(4)(a)(2) (1983) notes that habitual offenders may be sentenced to a term of imprisonment not to exceed thirty years.

96. FLA. STAT. § 794.011(5) (1983 & Supp. 1984).

97. Freeman, *supra* note 76, at 5.

98. Russell, *supra* note 1, at 2.

It is likely that some jurors have themselves experienced this type of forced intercourse in marriage. If a female juror admits that this level of force constitutes a sexual battery, she would in many cases be admitting that she herself has been sexually battered by her own husband. If a male juror admits this level of force constitutes sexual battery, he would in many cases be admitting that he himself is a rapist. It is doubtful that either a male or female juror would want to admit this. Also, jurors who have not experienced this form of sexual battery in marriage may tend to disbelieve that such conduct occurs in marriage. Therefore, convictions for sexual battery with this level of force will be difficult to obtain. Without evidence of great physical force, or admission of prior wife abuse, the jury may feel the wife consented to the intercourse.⁹⁹ There is generally an abhorrent disbelief that any man would commit rape, especially against his wife, and therefore the jury may distrust the wife's complaint.¹⁰⁰

D. Florida Statutes Section 794.022—Rape Shield

Rape shield laws deal with important rules of evidence, which are intended to protect the victim of rape from becoming a victim of the criminal justice system. The rape shield portion of the statute was substantially rewritten and amended in 1983.¹⁰¹

Section 794.022(1)¹⁰² was amended to delete the following cautionary instruction to the jury: "The court may instruct the jury with respect to the weight and quality of the evidence."¹⁰³ The removal of the cautionary instruction is an important step in removing judicial sanction of the notion that many rape claims are unfounded.¹⁰⁴ The present subsection states, "[t]he testimony of the victim need not be corroborated."¹⁰⁵ Although corroboration is not required under the statute, courts admit various forms of corroborating evidence, including

99. Note, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 618 (1976).

100. *Id.* at 616.

101. FLA. STAT. § 794.022(1), (2), (3) (1983)(amending Fla. Stat. § 794.022(1), (2) (1975)).

102. FLA. STAT. § 794.022(1) (1983).

103. FLA. STAT. § 794.022(1) (1975) included the instruction in the text of the statute.

104. J. WIGMORE, *ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 924(a) at 459 (1940)(many were falsely charged of rape and convicted).

105. FLA. STAT. § 794.022(1) (1983).

evidence of physical injury, presence of semen, and testimony of witnesses if available: "[T]he fact remains that proof of rape in most cases is sufficient only when the evidence is corroborated."¹⁰⁶

In marital sexual battery there may be little, if any, evidence of physical injury unless the level of violence is quite severe. The presence of semen will not be indicative of non-consensual intercourse in the same degree as in non-marital sexual battery, and it is unlikely that there will be any corroborating witnesses. The absence of the need for corroboration, directed by the statute, is therefore helpful. Realistically, despite the progressiveness of the amended statute, cases of marital sexual battery will need corroborating evidence to prove that non-consensual sexual battery occurred.

The greatest barrier to a marital rape conviction is the language of section 794.022(2), which deals with the admissibility of evidence concerning "specific instances of prior sexual activity between the victim and any other than the offender. . . ."¹⁰⁷ This barrier stems from the retention of a disputable myth, that prior specific acts of sexual conduct are relevant to the issue of consent.¹⁰⁸ This myth is based on the premise that an unchaste woman will lie,¹⁰⁹ and a belief that once a person has had prior voluntary sexual intercourse, she most likely has consented in the subsequent instance of rape.¹¹⁰ The statute forbids the introduction of evidence of prior sexual activity, unless it establishes a pattern of conduct which is relevant to consent,¹¹¹ or tends "to prove the defendant was not the origin of the semen, pregnancy, injury, or disease."¹¹² The court must first have a hearing in camera to determine

106. Hibey, *supra* note 18, at 314.

107. FLA. STAT. § 794.022(2) (1983).

108. See, e.g., MICH. COMP. LAWS ANN. § 750.520j(1)(b) (1975)(declares all evidence of prior sexual conduct with persons other than the accused is inadmissible, unless it shows the source of semen was not the defendant's, or where there is pregnancy, or disease). See also J. MARSH, A. GEIST & N. CAPLAN, *Rape and the Limits of Law Reform*, 23 (1982)(the elimination of such evidence in Michigan was due to its "irrelevance and highly prejudicial and inflammatory nature").

109. Note, *supra* note 99, at 626.

110. *Id.* at 624.

111. See *McElveen v. State*, 415 So. 2d 746, 747 (Fla. 1st Dist. Ct. App. 1982)(three specific incidents of prior sexual activity do not show a pattern of conduct relevant to the issue of consent). See also *Winters v. State*, 425 So. 2d 203, 204 (Fla. 5th Dist. Ct. App. 1983); *Hodges v. State*, 386 So. 2d 888, 889 (Fla. 1st Dist. Ct. App. 1980).

112. FLA. STAT. § 794.022(2) (1983).

if there is a pattern of conduct relevant to the issue of consent.¹¹³ Prior to the 1983 amendment, the relevance of the pattern of conduct was supposed to be decided outside the presence of the jury, but in practice this was rarely done.¹¹⁴ The requirement of an in camera hearing is an effort to guard the victim's privacy. The need for an in camera hearing gives credence to the view that such evidence is usually highly prejudicial.¹¹⁵

In a marital situation, evidence of prior sexual activity which establishes a pattern of conduct is admissible in two ways. First, the prior sexual relationship between the husband and wife is admissible. It is possible that prior unusual sexual conduct between a husband and wife will be exposed and used to prove that the act of violence before the court was a normal part of the couple's relationship, indicating consent to the present sexual battery. Second, if a married woman established a pattern of extramarital sexual conduct, this also is admissible. Deviant extramarital conduct, if it establishes a pattern of conduct indicative of consent, will be admitted to demonstrate consent to the sexual battery. However, neither of these types of behaviors necessarily establish consent to the particular act before the court, especially when the act was performed with violence and force.¹¹⁶ The fact that a person has had prior consensual sexual relations with another person has no bearing on whether there was consent to the present act. It is outrageous to even consider that a person consents to violence.

However, in the minds of jurors, extramarital sex, if admitted, is likely to cause the jurors to develop unconscious hostility toward the victim.¹¹⁷ Also, prior consensual activity with the offender may imply, in the minds of jurors, consent to the present sexual battery.¹¹⁸ This emphasis on the victim's behavior, rather than on the offender's, behavior should be eliminated from the statute because it has been shown to be of little probative value.¹¹⁹ The admission of prior sexual relations

113. *Id.*

114. FLA. STAT. § 794.022(2) (1979). See also Note, *supra* note 35, at 439 n.154.

115. Note, *supra* note 15, at 159.

116. Schwartz & Clear, *supra* note 47, at 137 "One does not think to ask the victim of assault for proof he or she is not a masochist, or provide a life history of all previous assaults, to establish a pattern that might mitigate the assailant's culpability". *Id.*

117. See Note, *supra* note 15, at 155.

118. *Id.* at 146.

119. See Note, *supra* note 35, at 440-41. Note, *supra* note 16, at 345. See also

with the defendant, as well as sexual relations with others, if a pattern of conduct is shown to be relevant to the issue of consent, creates a difficult evidentiary obstacle for a married woman to overcome.

The two redeeming features of the 1983 amendment to Florida Statutes section 794.022¹²⁰ are the requirement of an in camera hearing and the elimination of the cautionary instruction to the jury. Without the safeguard of an in camera hearing it is doubtful that a married woman would ever seek to prosecute her husband for sexual battery because she knows every detail of their marital history would be overheard by courtroom spectators, and possibly even the jury.¹²¹ Also, the cautionary instruction to the jury, to consider the victim's testimony with extra care, would discourage victims from bringing charges against their spouse, because it may promote the feeling that the victim is also on trial.

The last subsection is a new addition to the statute.¹²² Florida Statutes subsection 794.022(3), delineates a *per se* rule against the admission of "reputation evidence relating to a victim's prior sexual conduct,"¹²³ despite any other provision of law.¹²⁴ This addition helps to ensure that a victim's credibility will not be undermined by inferences of immorality by general reputation evidence. The exclusion of such evidence is an attempt to abrogate the common-law myth that unchaste women are liars.¹²⁵ In the marital context, the inadmissibility of reputation evidence will be as important as it will be in non-marital sexual battery.

It appears that the statute permits the admissibility of specific acts of prior sexual conduct under the conditions delineated under Florida

supra note 17 for rape shield statutes of other states, in relation to prior sexual conduct.

120. FLA. STAT. § 794.022(2) (1983).

121. Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 88 (1977).

122. FLA. STAT. § 794.022(3) (1983). The prior statute did not mention reputation evidence. It was thought that since such evidence was admissible at common law, it was admissible under the statute. See Note, *supra* note 35, at 437. See also *McElveen*, 415 So. 2d at 746.

123. FLA. STAT. § 794.022(3) (1983) ("Notwithstanding any other provisions of law" establishes the *per se* rule).

124. Previously, the controlling statute was FLA. STAT. § 90.404(1)(b)(1) (1983). This statute provided for the admission of "evidence of pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the trait, . . ." under the sexual battery statute. *Id.*

125. See Schwartz, *supra* note 14; Note, *supra* note 15.

Statutes section 794.022(2), holding on to the myth that such conduct is indicative of consent. The husband will invariably raise the issue of consent, as an affirmative defense, in virtually all cases of marital sexual battery.¹²⁶ The retention of the myth that previous sexual relations indicates consent to the present act is a formidable barrier to conviction. Counteracting the jury's inclination to disbelieve the existence of rape in marriage, however, is perhaps the most difficult obstacle of all.¹²⁷

E. Resistance

The Florida Sexual Battery Statute does not require resistance.¹²⁸ However, case law indicates resistance may be an important factor in the minds of the judges and juries. In *State v. Hudson*,¹²⁹ the offender grabbed the victim, pulled off her clothes, yanked her out of the car and threatened to seriously injure her.¹³⁰ The victim testified that she submitted out of fear for her physical safety.¹³¹ The court hinted that this was effective resistance. The Florida Second District Court of Appeal held that "questions of consent, force, resistance, and fear, are particularly within the province of the jury to determine."¹³² Apparently, in Florida resistance by the victim is sometimes important to demonstrate a lack of consent, but the need for resistance to show lack of consent is unrealistic and dangerous to the life of the victim.¹³³ To infer that lack of resistance implies consent is a throwback to the myth that a virtuous woman would "resist to the utmost"¹³⁴ to defend her honor. "There are many situations in which resistance is not a valid measure of lack of consent by rape victims."¹³⁵

126. Note, *Criminal Law—Sexual Battery—No Interspousal Exception Under Florida's Sexual Battery Statute—State v. Smith*, 401 So. 2d 1126 (Fla. 5th Dist. Ct. App. 1981), 10 FLA. ST. U.L. REV. 326, 336 (1982).

127. Pracher, *supra* note 10, at 732. The same point was made in a telephone interview with Jayne Weintraub, prosecutor in the case of *State v. Rider* (Aug. 14, 1984). Weintraub expressed the view that getting the jury to believe a husband can rape his wife is the most difficult barrier in the prosecution.

128. Note, *supra* note 35, at 426-29.

129. 397 So. 2d 426, 428 (Fla. 2d Dist. Ct. App. 1981).

130. *Id.* at 427.

131. *Id.*

132. *Id.*

133. See generally Schwartz, *supra* note 14, at 577-82.

134. *Id.* at 569.

135. *Id.* at 582.

Florida recognizes sexual battery as an act of violence, not a sexual act.¹³⁶ Since assault and battery do not require resistance by the victim,¹³⁷ the need for resistance in sexual battery must be solely related to old common-law myths about rape, and should be abolished. In *State v. Rider*,¹³⁸ for example, the court concluded that "the legislature by repealing the rape statute and enacting the sexual battery statute, intended to abrogate any common-law assumptions concerning the crime of rape."¹³⁹ It is apparent, however, that the common-law myths regarding prior sexual conduct and resistance continue to exist in Florida law. Florida courts should consider issuing jury instructions which advise the jury that lack of resistance is not indicative of consent to sexual battery. To expect resistance from a wife, when there is, at the very least, fear of possible violence, which may or may not cause serious personal injury, is to put a burden on the victim of sexual battery that is not placed on most other victims of crime.¹⁴⁰ "[T]o impute consent on the part of the victim exceeds the bounds of the law of consent."¹⁴¹

IV. Attitudes of Victims, Police, Prosecutors, Judges and Jurors: Impact on Marital Rape Convictions

Although Florida Statutes section 794, with its gradations of punishments reflecting levels of force, provides an adequate framework for marital rape convictions, a serious impediment within the statute to successful prosecutions lies with the admissibility of evidence of specific prior sexual activity. Also, case law, which permits the jury to consider resistance of the victim, results in inconsistencies that could effectively bar convictions. However, the major barriers to convictions do not lie within the statute, or within case law. Non-reporting by victims, police inaction, prosecutorial discretion, and the attitudes of judges and juries are the primary obstacles to successful prosecutions and convictions for marital rape. Even when a statute or case law permits the prosecution of husbands for marital rape, the problems in obtaining convictions for marital rape are exacerbated by the attitudes of the participants in the

136. *Smith*, 401 So. 2d at 1127.

137. *Schwartz & Clear*, *supra* note 46, at 146.

138. 449 So. 2d at 903.

139. *Id.* at 906.

140. *Schwartz*, *supra* note 14, at 583-88.

141. *Pracher*, *supra* note 10, at 730.

judicial process.¹⁴²

A. Victim Awareness and Cooperation

"One of the simplest and most effective ways that a victim can prevent a wrongdoer from being arrested and prosecuted is to fail to report the crime. . . ."¹⁴³ It is generally thought that the crime of rape is the most unreported type of crime in the United States.¹⁴⁴ There are no precise figures to indicate the number of spouses who do not report marital rape. One reason marital rape is seldom reported is that most states do not recognize rape in marriage in all situations,¹⁴⁵ as a crime.¹⁴⁶ In those states where the marital rape exemption has not been totally abolished, a husband has, in essence, a license to commit the debilitating and degrading crime of rape against his wife.¹⁴⁷

There have been few prosecutions¹⁴⁸ in states whose laws permit husbands to be prosecuted for marital rape, which may indicate that although the exemption for husbands is removed by statute or case law, the attitudes of victims, as well as those in the criminal justice system, are predominate factors in perpetuating the existence of the marital exemption. "In the case of marital rape, all the reasons that deter women from bringing rape charges [in non-marital rape] are exacerbated."¹⁴⁹ Marital rape is often only reported when it is accompanied by other violence.¹⁵⁰ Studies have shown that despite the level of violence used, some married women do not realize or admit they have been raped by their husbands.¹⁵¹ The attitude of the victim is one of denial, and inability or refusal to conceive of the violent sexual attack as rape.

142. Beinen, *Rape Reform Legislation in the United States: A Look at Some Practical Effects*, 8 VICTIMOLOGY 139, 140 (1983).

143. Hall, *The Role of the Victim in the Prosecution and Disposition of a Criminal Case*, 28 VAND. L. REV. 931, 934-35 (1975).

144. Freeman, *supra* note 76, at 6.

145. *See supra* note 3.

146. Barry, *Spousal Rape: The Uncommon Law*, 66 A.B.A.J. 1088, 1090 (1980).

147. *See generally* Griffin, *In 44 States It's Legal to Rape Your Wife*, STUDENT LAWYER 21, 57 (1980). *See also* Schwartz, *supra* note 2, at 51.

148. *See* Beinen *supra* note 142, at 144 (indicating there were "less than [five] prosecutions in three years . . . in the entire state [of New Jersey], which has a population of nine million"). *See also* Schwartz, *supra* note 2, at 48.

149. Griffin, *supra* note 147, at 57. *See also* Note, *supra* note 9, at 260.

150. Freeman, *supra* note 76, at 6.

151. *See generally* Freeman, *supra* note 76, at 6-8.

The Law Enforcement Assistance Administration (LEAA), in its study of forcible rape, conducted interviews with twenty-nine non-marital rape victims who did not report the crime,¹⁵² and listed the reasons for their failure to report.¹⁵³ The reasons spouses do not report rape are even more complex. Some wives internalize the reason for the rape and see themselves at fault.¹⁵⁴ Some are too "ashamed to talk about it,"¹⁵⁵ and "prefer to keep this humiliating experience private."¹⁵⁶ Victims of marital rape may fail to report because of fears of "loneliness, loss of . . . psychological security and admission of failure. . . ."¹⁵⁷ Additionally, wives may not report the rape because of financial inability to live without the economic assistance of their husbands.¹⁵⁸ In essence, then, there are three significant barriers to conviction arising from the attitudes of victims of marital rape. First, the victim has the attitude that if her husband is the offender, it is not rape. Second, even when the wife perceives the act as rape, other fears result in her not reporting the crime. Finally, these attitudes and fears, when coupled with the fact that in some Florida districts eighty percent of victims of domestic vio-

152. NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPT. OF JUSTICE, FORCIBLE RAPE, FINAL PROJECT REPORT, 15 (1978) [hereinafter cited as FORCIBLE RAPE].

153. The table shows an ordered rank of the reasons victims did not report to police.

Reasons for Not Reporting the Rape to Police.
(N = 29) (Multiple Answers Possible)

<u>RANK</u>	<u>REASONS</u>	<u>% RESPONSE</u>
1.	Fear of Treatment by Police or Procedures	52%
2.	Fear of Trial Procedures	34%
3.	Fear of Publicity or Embarrassment	34%
4.	Didn't Want Family or Friends to Know	34%
5.	Lack of Interest by Police	31%
6.	Fear of Revenge by Offender	28%
7.	Procedures Too Time-Consuming	17%
8.	Didn't Want Him Arrested/Punished	14%
9.	Probably Couldn't Identify Him	10%
10.	Didn't Think Police Would Believe You	3%
11.	Lack of Evidence/No Proof	0%

Id. at 15.

154. Freeman, *supra* note 76, at 7.

155. *Id.*

156. Griffin, *supra* note 147, at 57.

157. Finkelhor & Yllo, *supra* note 75, at 462.

158. Note, *supra* note 9, at 260.

lence drop the reported charges,¹⁵⁹ indicate that victim non-cooperation is a major hurdle to successful prosecutions for marital rape.

California has had some success in implementing marital rape laws.¹⁶⁰ The reason for this success has more to do with the educational campaign that occurred when the statute was drafted, than with the statute itself.¹⁶¹ Women's groups, people in the criminal justice system, and citizens in general, were educated as to the existence of marital rape and its prevalence in society.¹⁶² Following California's example, a state seeking to eliminate the marital rape exemption must not only enact a statute which permits the prosecution of husbands, but must make an effort to educate its citizens. If this occurs, victims will more frequently recognize the act as a rape and report it to the police, and citizens who will become prospective jurors will realize that husbands can and should be convicted for raping their wives.

Some California cities, as well as cities in other west coast states, have implemented no drop policies which effectively reduce victim non-cooperation after they report a crime.¹⁶³ No drop policies have been used to secure victim cooperation in many kinds of domestic violence cases. Prosecutors implementing this policy encourage victim cooperation by reassuring the victim that the state is responsible for the prosecution and warning the victim that once the charge is filed it will not be dropped.¹⁶⁴ In Anchorage, Alaska, a spouse abuse victim was jailed for contempt for non-cooperation.¹⁶⁵ However, most prosecutors have not taken such drastic measures in the implementation of existing no drop policies and have substantially reduced victim non-cooperation.¹⁶⁶ Greater victim cooperation will cause police and prosecutors to take domestic violence seriously and give it the priority it deserves.¹⁶⁷ With

159. See L. LERMAN, *supra* note 45, at 35. In response to a questionnaire, the district attorney's office in Jacksonville, Florida estimates 80% of victims of spouse abuse drop the charges. *Id.*

160. CAL. PENAL CODE § 262 (West Supp. 1981). See also Schwartz, *supra* note 2, at 49.

161. This view was expressed in a telephone interview with Laura X, of The National Clearinghouse on Marital Rape, 2325 Oak St., Berkeley, Ca. 94208. (Aug. 5, 1984).

162. *Id.*

163. L. LERMAN, *supra* note 45, at 34-36.

164. *Id.* at 45.

165. The National Law Journal, Aug. 22, 1983, at 4.

166. L. LERMAN, *supra* note 45, at 34.

167. *Id.* at 33.

the knowledge that prosecutors will pursue their complaints aggressively and with sensitivity, victims who would not report the rape due to fear of the treatment they would have received from police and prosecutors, will be encouraged to report the crime, further enhancing the likelihood of convictions.¹⁶⁸ These three approaches, legislation, education, and a no-drop policy, would enhance victim cooperation and lead to a greater number of convictions.

B. Police Assistance

Police are hesitant to respond to calls relating to marital violence.¹⁶⁹ Their reluctance to respond results from infrequency of prosecution and a fear for their own safety due to the extreme violence in marital disputes.¹⁷⁰ When there has been a prior relationship between the victim and the attacker, police are more likely to deem the charge of rape as unfounded and fail to act on the complaint.¹⁷¹ Police have wide latitude as to whether action should be taken and are usually "highly suspicious of rape complaints."¹⁷²

Married women are less likely to seek police intervention than women who are divorced.¹⁷³ Also, it has been determined that if a police officer holds subsequent police investigatory interviews at the police station, instead of at the victim's current residence, there is a higher rate of victim attrition.¹⁷⁴ Therefore, even when married women report the sexual battery, "[r]egardless of the truth of the charge, most marital rape complaints will not survive police investigation."¹⁷⁵ "[M]ost rape cases are never presented for prosecution; . . . [they] simply die a bureaucratic death. . . ."¹⁷⁶ In cases where the victim knows the offender, for example, the possibility of a victim's consent halts further development of the case beyond the investigatory stage.¹⁷⁷ Attitudes of police reflect attitudes of society. In marital rape, the police officer will

168. *Id.* at 34.

169. Note, *supra* note 9, at 246.

170. *Id.*

171. Hall, *supra* note 143, at 940. See also Pracher, *supra* note 10, at 738.

172. See FORCIBLE RAPE, *supra* note 152, at 31.

173. McLeod, *Victim Noncooperation in the Prosecution of Domestic Assault*, 21 CRIMINOLOGY 395, 405 (1983).

174. FORCIBLE RAPE, *supra* note 152, at 34.

175. Pracher, *supra* note 10, at 739.

176. FORCIBLE RAPE, *supra* note 152, at 46.

177. *Id.*

often find the complaint unfounded because of the existence of the previous consensual sexual relationship, and the fact that the relationship creates a nearly insurmountable problem of proof. Married women may report marital rape in cases where violence and physical injury exist.¹⁷⁸ The police will investigate and bring the case to the prosecutor when there is evidence of extreme violence.¹⁷⁹ Cases of marital rape not rising to this level of violence and physical injury may not get beyond the investigatory phase,¹⁸⁰ cutting off the chance of prosecuting the case. Although attitudes biased against rape victims may in general be changing,¹⁸¹ in cases of marital rape, a woman may still need to be "bruised, bloody, and damned near dead"¹⁸² . . . for the activity to be considered not consensual.¹⁸³ Therefore, even when a victim is willing to report the sexual battery to the police, she may find police reluctant to act.

C. Prosecutor Discretion

The prosecutor has great discretion in filing charges.¹⁸⁴ Prosecutors may be reluctant to file rape charges because of the many difficulties in obtaining convictions.¹⁸⁵ Also, not every prosecutor agrees on what constitutes rape.¹⁸⁶ In a marital rape, unless there is the use of force likely to cause serious injury, a prosecutor may feel the jury would not convict¹⁸⁷ and, therefore, not prosecute.¹⁸⁸ Frequently in rape

178. Freeman, *supra* note 76, at 6.

179. Hall, *supra* note 143, at 941.

180. L. LERMAN, *supra* note 45, at 14.

181. News/Sun Sentinel, Aug. 12, 1984 § A, at 15, col. 1 (Palm Beach Edition)(citing Lunt, *Juvenile Crime in Florida: Myths and Facts*, indicating that arrests for forcible rape in 1983, have increased by 70.9% since 1975).

182. Note, *supra* note 16, at 347 (quoting a past victim of rape).

183. *Id.*

184. FORCIBLE RAPE, *supra* note 152, at 48.

185. *Id.*

186. NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE. LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPT. OF JUSTICE, FORCIBLE RAPE: A MANUAL FOR FILING AND TRIAL PROSECUTORS, PROSECUTOR'S VOLUME III 10 (1978).

187. Telephone interview with Jayne Weintraub, prosecutor in the case of State v. Rider (Aug. 14, 1984). Weintraub indicated a jury is unlikely to convict without severe force likely to cause serious personal injury.

188. In State v. Rideout, No. 108, 866 (Marion County Or. Cir. Ct. 1978), prosecutor Garry Gortmaker stated in a pretrial remark that "if it had happened in the bedroom and he didn't beat her up, I'd agree with the other side." Barry, *supra* note

cases, a prosecutor will dismiss the case if the victim is reluctant to fully cooperate at trial.¹⁸⁹ Also, if a victim of rape does not endorse a negotiated plea, it influences the prosecutor to reject it.¹⁹⁰ Therefore, it is evident that victim cooperation and serious victim injury are the most important factors in influencing the decision of prosecutors to bring the case to trial.

Unfortunately, it has been found that often prosecutors "unintentionally discourage victims from following through with prosecution."¹⁹¹ The victim is made to feel that she is "responsible for the prosecution of the case and for whatever penalty is ultimately imposed,"¹⁹² despite the fact that rape is a felonious crime against the state. The prosecutor can promote victim cooperation if the prosecutor explains that the state is responsible for filing the charge and prosecuting the case, and that the victim will not be allowed to effect a dismissal of the charge, once filed.¹⁹³ Cities that have implemented this policy in wife battering cases have experienced a greater number of convictions, due to victim cooperation.¹⁹⁴ Therefore, there is a great need for prosecutors to become more sensitized to the victim's needs in order to avoid unintentional discouragement. At the present time, prosecutors may only choose to prosecute a marital rape case where there is extreme force likely to cause serious injury.¹⁹⁵ However, as more cases are prosecuted and jurors recognize that marital rape occurs frequently without extreme violence and severe injury, prosecutors will likely begin to prosecute those cases. Prosecutors can promote victim cooperation with appropriate policies, and as a result enhance conviction rates.

D. Attitude of the Bench

The judge's attitude toward marital rape can impact on the jury's decision in at least two ways. First, the general demeanor of the judge may sway the jury, which tends to look upon the judge as the ultimate authority figure in the courtroom.¹⁹⁶ The judge may feel that it is im-

146, at 1091.

189. Hall, *supra* note 143, at 951.

190. *Id.* at 952.

191. L. LERMAN, *supra* note 45, at 33.

192. *Id.*

193. *Id.* at 45.

194. *Id.* at 34.

195. *See supra* note 187.

196. L. HOLMSTROM & A. BURGESS, THE VICTIM OF RAPE: INSTITUTIONAL RE-

possible to rape one's wife and unconsciously reinforce similarly held beliefs of jurors.¹⁹⁷ Second, the judge's discretion in deciding when certain evidence is admissible, especially evidence of prior sexual conduct, influences the outcome of the case.¹⁹⁸ The judge's role should be to weigh the evidence according to the rules of evidence, and to admit the evidence when the probative value outweighs its prejudicial value.¹⁹⁹ There is a belief that in many states, including Florida, judges apply discretion to the admissibility of evidence that does not conform to statutory provisions.²⁰⁰ In cases where the judge abuses his discretion, and the jury acquits the defendant, the state is unable to appeal due to the constitutional ban of placing the defendant in double jeopardy.²⁰¹

The judge's admission of evidence of rape trauma syndrome²⁰² in cases of marital rape could be enormously helpful in the prosecution of husbands, especially where there is no evidence of severe physical injury. The acute symptoms of rape trauma syndrome include feelings of "shock, numbness, bewilderment, fear, terror, disgust, humiliation, vulnerability, powerlessness, anxiety, and shame."²⁰³ It has been documented that most rape victims continue to suffer from rape trauma syndrome at least one year after the rape.²⁰⁴ The Kansas Supreme Court and the Montana Supreme Court recently permitted evidence of

ACTIONS 158-62 (1978). See also J. MARSH, A. GEIST, & N. CAPLAN, *supra* note 108, at 58-62.

197. Chappel, *Forcible Rape and the Criminal Justice System*, 22 CRIME & DELINQ 125, 136 (1976).

198. Note, *supra* note 15, at 156 (juries are likely to acquit when inflammatory evidence of prior sexual conduct of the victim is admitted).

199. Hibey, *supra* note 18, at 326.

200. Nicholl, *Idaho Code § 18-6105: A Limitation on the Use of Evidence Relating to the Prior Sexual Conduct of the Prosecution in Idaho Rape Trials*, 15 IDAHO L. REV. 323, 342-43 (1979). See also Beinen, *supra* note 142, at 147-48.

201. Note, *supra* note 15, at 158.

202. In *State v. Marks*, 231 Kan. 645, 653, 647 P.2d 1292, 1299 (1982) the psychiatrist, Dr. Modlin, testified that "[s]ymptoms of rape trauma syndrome include fear of offender retaliation, fear of being raped again, fear of being home alone, fear of men in general, fear of being out alone, sleep disturbance, change in eating habits, and sense of shame." *Id.* See also Note, *Scientific Evidence in Rape Prosecution*, 48 UMKC L. REV. 216, 221-22 (1980), where the author indicates his opinion that "most trial courts . . . would allow the jury to consider the evidence [of rape trauma syndrome]."

203. Becker, Skinner, Abel, Howell & Bruce, *The Effects of Sexual Assault on Rape and Attempted Rape Victims*, 7 VICTIMOLOGY 94, 95 (1983).

204. *Id.* at 99.

rape trauma syndrome to be introduced at trial.²⁰⁵ The Kansas Supreme Court held that rape trauma syndrome was a sufficiently developed phenomena which "is generally accepted to be a common reaction to sexual assault."²⁰⁶

In *Anderson v. State*,²⁰⁷ the Florida Fourth District Court of Appeal held that "[t]he trial court should have excluded the testimony related to the changes in the victim's behavior pattern following the [sexual] assault."²⁰⁸ However, the court concluded that the admission "constituted harmless error"²⁰⁹ and had "no real prejudicial effect,"²¹⁰ the court therefore denied a new trial.²¹¹ The court ignored the existence of rape trauma syndrome. In ruling that the testimony should have been excluded, the court relied on a 1919 case²¹² which stated that "[w]hat happened after the criminal act in no wise affected either the guilt or innocence of the accused. Her giving birth to a dead child, her sufferings, the impairment of her health, were not material to the issues involved."²¹³ However, in *Division of Corrections v. Wynn*,²¹⁴ the Florida First District Court of Appeal indicated that the admission of rape trauma syndrome was an appropriate use of judicial discretion.²¹⁵

Florida courts should acknowledge the significant development of rape trauma syndrome and battered wife syndrome. Florida judges could enhance convictions for marital rape if they follow the example of the Kansas and Montana Supreme Courts and admit evidence of rape trauma syndrome when the defense is consent. In addition, Flor-

205. *Compare Marks*, 231 Kan. at 653, 647 P.2d at 1299 and *State v. Liddell*, — Mont. —, 685 P.2d 918, 923 (1984), with *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982); *State v. Taylor*, 663 S.W.2d 235 (Mo. 1984); and *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984)(reject evidence of rape trauma syndrome). See also Dobson, *Survey of Kansas Law: Evidence*, 625 U. KAN. L. REV. 662, 663-64 (1984), which raises interesting problems concerning introduction of collateral issues and possible adverse outcomes if a victim does not suffer from rape trauma syndrome.

206. *Marks*, 231 Kan. at 653, 647 P.2d at 1299.

207. 439 So. 2d 961 (Fla. 4th Dist. Ct. App. 1983).

208. *Id.* at 962.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Bynum v. State*, 76 Fla. 618, 622, 80 So. 572, 573 (1919), *rev'd on other grounds*, *Hunter v. State*, 95 So. 115, 116, 118 (Fla. 1923).

213. *Id.*

214. 438 So. 2d 446 (Fla. 1st Dist. Ct. App. 1983).

215. *Id.* at 448.

ida courts should admit evidence of battered wife syndrome to show that the wife had a reasonable belief that her husband's threats of violence would be carried out. Problems of proving marital rape would further diminish if Florida judges use their discretionary powers to exclude prior sexual conduct admitting it only when the pattern of sexual conduct could have no other possible meaning but consent. Finally, if judges exhibit a courtroom demeanor that is cordial to the anxious victim, and refrain from any actions or tone which show their own bias to the jury, convictions for marital rape should increase.²¹⁶

E. The Jury

The most difficult task for a prosecutor in a case of marital rape is to convince the jury that a husband can actually rape his own wife.²¹⁷ A 1966 study²¹⁸ indicates that jurors will most likely not convict a defendant for rape when the defendant and the victim have had prior sexual relations, even when there is evidence of violence.²¹⁹ The same study demonstrates that when a victim's character is shown to be tarnished, the jury is also apt to acquit the defendant.²²⁰ Recently, questionnaires were sent to judges in Michigan to assess changes in jury attitudes under Michigan's Criminal Sexual Conduct Law.²²¹ A majority of the judges thought jurors were less conservative than in the past, and would more often render guilty verdicts in rape cases.²²² The judges indicated that the change in jury behavior was due to "(1) changes in public attitudes regarding sexual behavior, (2) public awareness about rape, and (3) the impact of the women's movement, . . ." rather than the statute itself.²²³ However, many jurors still come to court with numerous stereotypical notions about rape.²²⁴ One of

216. Miami Herald, Sept. 18, 1984, at B1, B2, col.1. The judge also has a duty to impose proper sentences which reflect the seriousness of the crime. In *Rider*, the jury convicted the husband because "[h]is story didn't hang together." The judge however, mitigated Rider's possible life sentence to fourteen years, despite the fact Rider was on parole for second degree murder at the time of the incident. The judge reasoned that the Riders were "not by any means your typical surburban couple." *Id.*

217. See *supra* note 127.

218. H. KALVEN & H. ZEISEL, *supra* note 48, at 252-57.

219. *Id.* at 251.

220. *Id.* at 249-51.

221. J. MARSH, A. GEIST & N. CAPLAN, *supra* note 108, at 56.

222. *Id.*

223. *Id.*

224. L. HOLMSTROM & A. BURGESS *supra* note 196, at 168.

these notions is that a husband cannot rape his wife.²²⁵

Therefore, citizens as prospective jurors will need to be educated that marital rape occurs frequently and that it is a crime.²²⁶ Jurors should be aware that victims of marital rape experience, at the very least, the same trauma and humiliation as other non-marital rape victims.²²⁷ When this educational process is complete it will be easier to convince the jury that it is a crime to rape one's wife.

V. Conclusion

Florida is one of very few states which holds a husband criminally liable for the rape of his wife, whether they are separated or living together. The problems of proving marital rape, however, may bar the successful prosecution of most husbands. The problem in obtaining convictions for marital rape is not an acceptable reason for states to retain the exemption for husbands. "Many types of prosecutions are rare and difficult—treason, for example—and yet we strongly uphold the need to keep such laws on the books."²²⁸

One obvious remedy for the problem of obtaining convictions for marital rape lies in legislative reform which would permit the prosecution of husbands for marital rape. The reform should include rape shield laws which eliminate the admissibility of prior sexual activity as indicative of credibility or consent. Evidence of rape trauma syndrome should be admitted in cases of marital rape to demonstrate lack of consent to the sexual battery. Evidence of battered wife syndrome should be admitted to show the victim had reason to fear her husband would carry out his threats of inflicting bodily harm. However, the most effective way to enhance prosecutions for marital rape lies in the education of victims, police, prosecutors, judges, and juries. Without changes in the attitudes of these participants in the criminal justice system, reforms in the law, although important statements of public policy, will not provide relief to the one out of seven wives who are raped by their husbands.²²⁹

Susan Ruby

225. Pracher, *supra* note 10, at 731-32. See also Griffin, *supra* note 147, at 57.

226. D. RUSSELL, *supra* note 1, at 2. See also Finkelhor & Yllo, *supra* note 75, at 461.

227. See D. RUSSELL, *supra* note 1, at 190.

228. Schwartz, *supra* note 2, at 48.

229. D. RUSSELL, *supra* note 1, at 2.